Supreme Court, U.S.
FILED

99 1 1 7 JUN 1 1999

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LUMBERMENS MUTUAL CASUALTY COMPANY,

Petitioner,

v.

LIBERTY MUTUAL INSURANCE COMPANY, et al.

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case involving the interpretation of an insurance policy, the jury was not permitted to hear evidence of the intent of the parties to the policy or to determine the meaning of the disputed policy language. In addition, the trial court determined that the substantive law of the State of Maryland was applicable to the case. The trial court also refused to dismiss the claims of a party whose insurer paid the damages claimed by it in this action and to limit the recovery of parties who contractually agreed to limit their claims against Petitioner. The questions presented are:

1. Whether the Seventh Amendment to the United States Constitution guarantees a defendant the right to have a jury hear evidence of the intent of the parties to an insurance policy and to determine the meaning of disputed policy language.

2. Whether the substantive law of the District of Columbia is applicable when all contacts, with the exception of the situs of the underlying occurrence, were located in the District of Columbia.

3. Whether a party whose insurer paid its claimed damages is not a real party in interest and is therefore unable to maintain an action for those damages.

4. Whether parties' contractual limitations on their right to recovery under an insurance policy limits their claim for attorneys' fees and prejudgment interest in a suit based on that policy.

LIST OF PARTIES

The respondents herein are:

Liberty Mutual Insurance Company

S. J. Groves & Sons Company

Granite Construction Company

Pennsylvania Manufacturers Association Insurance Group

The appellees below included all respondents, as well as Truland Corporation and Philadelphia Bourse, Inc. d/b/a E. C. Ernst.

LIST OF RELATED CORPORATIONS

Petitioner's parent corporation is Kemper Insurance Co.

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PETITION FOR A WRIT OF CERTIORARI

Lumbermens Mutual Casualty Company (hereinafter referred to as "Lumbermens") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The decisions of the court of appeals on the suggestion for rehearing in banc and petition for rehearing (App. C, *infra*, 47a –49a) are unreported. The opinion of the court of appeals (App. A, *infra*, 1a-4a) is unreported. The opinions, judgments and orders of the district court including the verdict sheet submitted to the jury by order of the court (App.B, *infra*, 5a-46a) are unreported.

JURISDICTION

The court of appeals entered its judgment on January 20, 1999 (App. A, *infra*, 1a-4a). A suggestion for rehearing in banc which, pursuant to Fed. R. App. P. 35 and 40 and Circuit Rule 35 included a petition for rehearing by the panel, was timely filed and was denied on March 3, 1999 (App. C, *infra*, 47a-49a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. Amend. VII.

STATEMENT

Procedural History

Respondents, Granite Construction Company ("Granite"), S.J. Groves & Sons Company ("Groves"), Pennsylvania Manufacturers Association Insurance Group ("PMA"), and Liberty Mutual Insurance Company ("Liberty"),

together with The Philadelphia Bourse d/b/a E.C. Ernst ("Ernst"), and Truland Corporation ("Truland") filed a common law cause of action in the United States District Court for the District of Columbia against Lumbermens. The jurisdiction of the district court was invoked under 28 U.S.C. § 1332(a) because of diversity of citizenship. The suit claimed damages for Lumbermens' alleged failure to defend and indemnify respondents in three lawsuits, Estate of Alice Lucy v. WMATA, C.A. No. 87-2360-JHG (the "Lucy" case), Butler v. WMATA, C.A. No. 87-3425-GHR (the "Butler" case), and Artis v. WMATA, C.A. No. 87-2319-HHG (the "Artis" case), each of which arose from an electrical accident at a metrorail station in Maryland on June 4, 1987. The plaintiffs in the three suits filed suit against the Washington Metropolitan Area Transit Authority ("WMATA") which then sued Granite and Groves, the joint venture that constructed the station, and the electrical contractors, Ernst and Truland. The three suits were settled.

The defendants in the Lucy, Butler, and Artis cases, together with their insurance carriers, filed suit in this action against Lumbermens, alleging that it had breached its insurance policy by failing to provide defense and indemnity in the underlying actions. A jury trial on limited issues was held on November 4, 1996 through November 13, 1996 and the jury answered special interrogatories. Judgment was entered on November 25, 1997 against Lumbermens in favor of respondents in the approximate amount of $3.7 million. App. B, *infra*, 42a-44a.

Lumbermens appealed to the court of appeals, raising nine errors in the trial court's rulings. On January 20, 1999, a panel of the court of appeals entered a judgment with accompanying Memorandum affirming in part and reversing in part the judgment of the district court, and remanding the matter to the district court for further proceedings. App. A, *infra*, 1a-4a. The memorandum opinion only addressed two of the issues raised by Lumbermens. The court of appeals recognized that the district court erred by not permitting the jury to make the assessment of damages and reversed the district court's decision in that respect. The court of appeals also agreed with

Lumbermens that, since two of the respondents, Truland and Ernst, were fully compensated for their losses by their insurers, they were not real parties in interest and their claims should have been dismissed. Notwithstanding its recognition of the district court's erroneous rulings, the court of appeals failed to address any of the other issues raised by Lumbermens, including Lumbermens' assertion that the claims of a third plaintiff, Granite, should have been dismissed because it, like Truland and Ernst, was not a real party in interest. Lumbermens timely filed a suggestion for rehearing in banc, which included a petition for rehearing by the panel, both of which were denied without opinion. App. C, *infra*, 47a-49a.

Factual Background

Respondents' complaint is based upon a Lumbermens insurance policy paid for by WMATA. The completed operations coverage endorsement of the policy extended coverage to contractors after they left a jobsite and was not an exclusion in the policy. The endorsement states, in relevant part, as follows:

> It is agreed that this policy does not apply, except with respect to WMATA, to bodily injury or property damage included within the Completed Operations Hazard or the Products Hazard if such bodily injury or property damage occurs more than three (3) years following the time when all operations to be performed by a named insured having a general or prime contract with WMATA have been completed and such contract has been accepted by WMATA but only with respect to those operations under the completed and accepted contract.

Lumbermens denied coverage of the three underlying suits based on the fact that the WMATA contract had been completed and accepted for insurance purposes more than three years prior to the accident of June 4, 1987.

There was no dispute that the operations or work performed under the contract had been completed more than three years before the accident. To determine whether coverage existed, therefore, it was necessary to determine the date of acceptance of the contract by WMATA. The respondents asserted that the contract was accepted on June 8, 1984, which was less than three years before the accident. Lumbermens contended, and presented evidence in support, that the contract had been accepted long before June 8, 1984.

As discussed above, the three underlying suits were ultimately settled. Liberty, Truland's insurer, and PMA, Ernst's insurer, paid the entirety of Truland and Ernst's attorneys' fees and settlement payments. Similarly, Granite's insurer, CNA, paid all of Granite's attorneys' fees and costs. Granite belatedly claimed, however, that it reimbursed CNA for these amounts, although in the course of the litigation it had never produced any checks documenting this alleged reimbursement.

When the underlying Lucy case was settled, Ernst/PMA and Truland/Liberty agreed to limit their recovery in the present action to an agreed-upon amount in consideration of the dismissal of WMATA's claims against them. The agreement limited the recovery of Truland and its insurer, Liberty, against the Lumbermens policy to $225,000 and limited the recovery of Ernst and its insurer, PMA, against the policy to $250,000.

The Trial Before the District Court

This case was assigned to a magistrate for trial, with the jury to decide the factual issues of when acceptance occurred and whether the policy provided coverage for the underlying accidents. In her rulings, the magistrate ruled, *inter alia*:

> a. to bifurcate the trial, and that Lumbermens was not entitled to a jury trial on the issue of damages (App. B, *infra*, 23a, 35a-36a);
>
> b. that the jury would only be permitted to determine whether or not the parties had a mutual intent concerning the meaning of the

phrase "and such contract has been accepted by WMATA" (App. B, *infra*, 28a);

c. that Lumbermens' motion to dismiss/summary judgment as to Granite, Ernst, and Truland was denied (App. B, *infra*, 16a); and

d. to limit the testimony of several of Lumbermens' witnesses (App. C, *infra*, 22a-24a).

After presentation of all the evidence during which the respondents proceeded first with their case, the trial court imposed on Lumbermens the burden of proving that the parties to the policy had a mutual intent of the meaning of the phrase "and such contract has been accepted by WMATA" and whether that understanding was made known to the plaintiffs. App. B, *infra*, 27a-28a. The trial court refused to allow the jury to determine whether coverage existed on the date of the accident or to determine when the contract was accepted for insurance purposes. Based upon the jury's limited finding that Lumbermens had not met its burden of proof, the magistrate entered judgment on liability in favor of respondents. App. B, *infra*, 32a-44a.

The trial court denied Lumbermens' request for a jury trial on the issue of damages. Lumbermens objected to certain of the respondents' claimed attorneys' fees and costs, including Ernst's and Truland's claims for reimbursement in excess of the amounts agreed to in their settlements of the Lucy case, which settlement provided:

> . . . the following limitations on the recovery of claims against policy no. 1 YL 751 451 issued by Lumbermens Mutual Casualty Co., or against WMATA, have been agreed to: Truland Corporation, Liberty Mutual Insurance Co. and WMATA have agreed to limit any recovery against this policy and WMATA to a sum no higher than $225,000.00; E.C. Ernst, Inc., PMA Insurance Group and WMATA have agreed to

limit any recovery against this policy and against WMATA to a sum no higher than $250,000.

Without any further hearing or testimony, but after submission of the parties' positions on attorneys fees and expenses, on August 6, 1997 the magistrate entered an order granting respondents' motion for judgment on damages in its entirety. App. B, *infra*, 32a-39a. On November 25, 1997, the trial court entered a monetary judgment in the amount of $3,711,682.58. App. B, *infra*, 42a-44a.

As discussed above, Lumbermens appealed to the court of appeals, and raised nine points of error in the trial court's rulings. The court of appeals's Memorandum Opinion only addressed two of those arguments and, as to those arguments, it agreed with Lumbermens and reversed the decision of the trial court. It is impossible to discern, from the opinion, its grounds for affirming the other decisions of the trial court. Because of the court of appeals's failure to adhere to legal precedent and its failure to address the remaining issues of Lumbermens' appeal, Lumbermens filed a suggestion for rehearing in banc which included a petition for rehearing. Without opinion, the court of appeals denied the petition.

REASONS FOR GRANTING THE PETITION

As the court of appeals acknowledged, the trial court committed reversible error in several of its rulings. Nevertheless, the court of appeals permitted to stand several rulings of the trial court which served to restrict Lumbermens' Seventh Amendment right to a jury trial and which resulted in a verdict against Lumbermens which was based on numerous misapprehensions of existing law. This case provides an opportunity to remedy these misapprehensions, some of which are based upon the lower courts' failure to follow the dictates of this Court. Moreover, the decision below is

erroneous, and the issues that this case addresses are important.

I. The Lower Courts' Restriction on the Jury's Determination Impermissibly Violated the Seventh Amendment and Directly Contravened Dispositive Substantive Law of the Highest Courts of Maryland and the District of Columbia.

Not only did the trial court prevent the jury from hearing evidence of the intent of the parties to the policy, as discussed in Section III. A., below, it also failed to permit the jury to determine the meaning of the policy phrase "and such contract has been accepted by WMATA", in clear contravention of well-settled substantive law. The dispute in this case centers on the determination of the meaning of "accepted contract", which is undefined in the policy. The trial court, by its ruling, refused to permit the jury to decide the central issue of the case and to consider the different inferences that could be drawn from the evidence adduced. This ruling violated the Seventh Amendment as well as applicable rules of contract construction as pronounced by the highest courts of Maryland and the District of Columbia.

This Court has recognized the importance of preserving a litigant's right to a jury trial in a civil action as guaranteed by the Seventh Amendment to the United States Constitution. Wilkerson v. McCarthy, 336 U.S. 53, 55 (1949) (involving a case arising under the FELA). For the substantive reasons described below, the lower courts impermissibly trampled on Lumbermens' right to have a jury decide the determinative issue in this case.

Moreover, this Court has held that the court of appeals is to conduct a *de novo* review of the district court's determination of applicable state substantive law. In the instant case, not only did the court of appeals fail to conduct such a review, it failed to even address Lumbermens' challenge to the district court's ruling.

This is impermissible under Salve Regina College v. Russell, 499 U.S. 225 (1991), which held:

> We conclude that a court of appeals should review *de novo* a district court's determination of state law. . . .
>
> * * * *
>
> Independent appellate review necessarily entails a careful consideration of the district court's legal analysis, and an efficient and sensitive appellate court at least will naturally consider this analysis in undertaking its review.

Id. at 231.

Contrary to this Court's directive, the court of appeals's decision reveals no consideration, much less a careful consideration, of the district court's legal analysis. This case presents an opportunity for this Court to reemphasize the vitality of its directive in Russell and to compel the court of appeals to perform the requisite *de novo* review.

Furthermore, the decision of the district court, as affirmed by the court of appeals, was erroneous. The rules of contract construction are clear. A case involving interpretation of a written contract requires that the "writing must be interpreted as a whole, giving reasonable, lawful, and effective meaning to all its terms." 1010 Potomac Assoc. v. Grocery Mfrs. Of America, 485 A.2d 199, 205 (D.C. App. 1984); see also Pacific Indemnity Co. v. Interstate Fire and Casualty Co., 302 Md. 383, 388, 488 A.2d 486 (1985) ("To determine the intention of the parties to the insurance contract, which is the point of the whole analysis, we construe the instrument as a whole"). The Restatement (Second) of Contracts § 202(2) states: "A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together." Furthermore, *it is for the trier of fact* to determine the proper construction of ambiguous policy language. National Indemnity Co. v. Continental Ins. Co., 61 Md. App. 575, 579, 487 A.2d 1191 (1985) (emphasis added). Where a jury trial is requested, the jury is charged with

interpreting the contract. 1901 Wyoming Ave. Corp. v. Lee, 345 A.2d 456, 461, n.8 (D.C. App. 1975). The jury must then determine "what a reasonable person in the position of the parties would have thought [the disputed language] meant," Ibid., and therefore to determine whether the policy provided insurance coverage for the accident to the contractors. See Electronic Instruments for Research, Inc. v. Georgetown University, 222 A.2d 708 (D.C. App. 1966) (ambiguity in purchase order required court to admit and consider, as finder of fact, testimony of the parties as to their competing interpretations). The analysis is the same under Maryland law. See Nationwide Mutual Ins. Company v. Tufts, 118 Md. App. 180, 702 A.2d 422 (1997), cert. denied, 349 Md. 104 (1998), in which the Court of Special Appeals of Maryland reaffirmed that it is the province of the jury to interpret ambiguous policy language.

The failure to permit the jury to determine the meaning of the language at issue was of momentous importance in this case.[1] If it had been permitted to hear all of the evidence involving the intention of the parties, and if it had been permitted to determine the meaning of the policy language, the jury could have concluded that the date of acceptance occurred prior to June 5, 1984. The trial court's rulings, which were violative of the Seventh Amendment and contrary to long established rules of contract interpretation, resulted in virtually a pre-determined verdict against Lumbermens.

Despite its recognition that the trial court impermissibly restricted Lumbermens' right to a jury trial in one respect, the court of appeals failed to address the trial court's other impermissible restriction. It is extremely important that the erroneous rulings of the lower courts be corrected by this Court in a manner consistent with its prior rulings and that, on remand, the jury be permitted to hear and consider all of the evidence,

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[1] The district court judge ruled that the meaning of "acceptance," and when acceptance occurred, were to be determined by the trier of fact (App. B, *infra*, 12a); however, the magistrate trial judge did not permit the jury to make these determinations.

and reach a verdict that comports with the law. This Court should grant certiorari to review these important conflicts with the Seventh Amendment to the United States Constitution and with the substantive law of the State of Maryland and District of Columbia.

II. The Lower Courts' Decisions Not To Dismiss Granite Construction Company Were Contrary to the Law Established by This Court in *United States v. Aetna Casualty & Surety Co.*

This Court's decision in United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 381 (1949), teaches that "a subrogee [who] has paid an entire loss suffered by the insured . . . is the only real party in interest and must sue in its own name." (Emphasis added.) Despite the fact that Truland and Ernst admitted that their insurers paid the entirety of the damages sought by them in this case, the trial court denied Lumbermens' motion to dismiss or for summary judgment as to Truland, Ernst and Granite pursuant to Aetna. The court of appeals reversed this decision in part, and ruled that Ernst's and Truland's claims should have been dismissed. The court of appeals, however, failed to address the trial court's refusal to grant Lumbermens' motion as to Granite. This, too, was contrary to law established by this Court and was erroneous.

Granite provided no affidavit or admissible evidence in opposition to Lumbermens' argument that Granite was not a proper party to the litigation. Rather, it submitted a single, unauthenticated document that purported to be a page from the policy of Granite's insurer, CNA. At that time, Granite argued that CNA was only a partial subrogee because of the manner in which Granite's insurance premiums were calculated, although Granite did not seek to recover those premiums in this action. Thereafter, when plaintiffs filed their motion for judgment on damages, Granite submitted no evidence indicating that it, not CNA, paid any costs or attorneys' fees in connection with the underlying cases. Only after the trial court's August 6, 1997 judgment order did Granite submit an affidavit and a letter asserting that Granite reimbursed CNA for all costs incurred in

defending the underlying actions. This purported evidence was seriously flawed. It was not the "best evidence" of damages under Federal Rule of Evidence 1002. No checks or other evidence of payment were ever produced. Further, Lumbermens was denied any opportunity to cross-examine the affiant or inquire about the letter. Notwithstanding these inadequacies, the trial court denied Lumbermens' motion to strike the affidavit and letter. Nevertheless, even with the affidavit and letter in evidence, Granite lacks standing to sue and its claims should have been dismissed under this Court's ruling in Aetna.

Granite's claims in this action seek reimbursement for amounts paid in settlement of the underlying claims and for attorneys' fees in defending those claims. Based upon Granite's own evidence, CNA paid those amounts. Granite has *not* made claim in this case for reimbursement of premiums or other payments to its insurance carrier. Consequently, as to the damages sought in this action, CNA is the only real party in interest, and Granite has no standing to sue. Just like the claims of Ernst and Truland, Granite's claims should have been dismissed pursuant to Aetna. As this Court held:

> If the subrogee has paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name. . . . If it has paid only part of the loss, both the insured and insurer (and other insurers, if any, who have also paid portions of the loss) have substantive rights against the tortfeasor which qualify them as real parties in interest.

Id. at 380-81.

Therefore, just as Ernst and Truland had no standing because their insurers had paid in full the damages that they were seeking in this action, Granite has no standing for the same reason. By failing to extend its reasoning to Granite's claims, the court of appeals impermissibly ignored the mandates of this Court. This Court should grant Lumbermens' petition in order to remedy the court of appeals's misapplication of the law.

III. The Other Erroneous Decisions of the Lower Courts So Far Departed From the Accepted and Usual Course of Judicial Proceedings That They Should Be Reviewed by This Court.

The district court made a number of other rulings which strayed so far from the mandate of the law that they represented substantial departures from the accepted and usual course of judicial proceedings. The court of appeals's decision gives no indication as to whether it even reviewed these rulings. It is appropriate for this Court to grant this Petition and review these erroneous rulings.

A. The lower courts' refusal to permit witnesses to testify about their intent in negotiating and drafting the policy was contrary to the law established by the highest courts of the District of Columbia and Maryland.

The trial court refused to allow the witnesses who were involved in the negotiations and drafting of the Lumbermens policy to testify as to their intent, interpretation, and understanding of the policy language. The stated reason for this refusal was that the witnesses could not specifically recall conversations addressing the disputed policy provision and, therefore, could not address the mutual intent of the parties at the time that the policy was being negotiated. This holding unfairly and prejudicially limited Lumbermens' ability to present evidence as to the intent of the parties and should have been reversed by the panel. In addition to the effect on this case, the lower courts' decision causes an inability for future litigants to anticipate what substantive law will be applied to cases of contract interpretation brought in the District of Columbia Circuit.

There is no serious dispute that, in determining the intent of the parties to an ambiguous contract, a court is not limited to testimony of the mutual intent of the parties who negotiated the

contract, but instead must consider *all* evidence relating to the intent of the parties.

The highest courts of the District of Columbia and Maryland recognize that the negotiating parties' own construction of a contract is relevant. See 1010 Potomac Assoc. v. Grocery Mfrs. Of America, 485 A.2d at 205 (D.C. App. 1984); Canaras v. Lift Truck Services, 272 Md. 337, 352, 322 A.2d 866 (1974). The lower courts' rulings directly contravened the mandates of these highest courts. Thus, Lumbermens should not have been limited to evidence concerning verbal expressions of mutual intent during the negotiating process in order to demonstrate the intentions of the parties. Clearly, in order to prove that the parties had a mutual understanding of such language, they must be permitted to offer proof of their understanding independently, so that the trier of fact can determine whether, in fact, they had a common understanding of the meaning of the language and, if so, what that understanding was.

> In the event of an ambiguity in the terms of a contract, the court must necessarily look to the intention of the parties at the time of the making of the contract. In searching out the parties' intent, the court as fact finder must consider all evidence, including extrinsic evidence, which has been found relevant on the issue and which does not vary or contradict the language of the agreement.

Admiral Builders Sav. & Loan Assoc. v. South River Landing, Inc., 66 Md. App. 124, 132, 502 A.2d 1096 (1986). See also Chicago Bd. Options Exchange, Inc. v. Connecticut General Life Ins. Co., 713 F.2d 254, 258 (7th Cir. 1983) ("In construing an ambiguous contract the court must consider any evidence that sheds light upon the intentions of the parties, the purpose of the contract, and the circumstances surrounding the formation of the contract"); International Brotherhood of Painters and Allied Trades v. Hartford Acc. & Indem.

Co., 388 A.2d 36, 43 (D.C. App. 1978) (extrinsic evidence of parties' negotiations prior to and contemporaneous with formation of agreement, as well as course of conduct under the agreement, are relevant).[2]

The trial court's refusal to allow the jury to hear testimony of the witnesses who were responsible for drafting the policy language, and the court of appeals's failure to reverse this decision, were erroneous and represent a clear conflict with the substantive law of the highest courts of Maryland and the District of Columbia. This Court should grant Lumbermens' petition to resolve this conflict and correct the lower courts' errors.

B. The lower courts' decisions failed to apply well-settled tenets of contract interpretation by not limiting PMA's and Liberty's recoveries to the amounts agreed upon in their settlement agreement.

Ernst/PMA and Truland/Liberty entered into a settlement agreement in the underlying Lucy case on March 16, 1990, which limited Truland/Liberty's recovery against the Lumbermens policy to $225,000 and limited Ernst/PMA's recovery against the policy to $250,000. The amounts paid by Ernst/PMA and Truland/Liberty in settlement of the underlying cases and for attorneys' fees to defend those cases total a lesser amount than the caps contained in the settlement agreement. Notwithstanding their clear expression of intent to limit their recovery against the policy, Ernst/PMA and Truland/Liberty sought, and received from the trial court, damages for prejudgment interest and attorneys' fees for pursuing this action,

[2] In addition, WMATA did not participate in the negotiations concerning the policy language, yet the trial court erroneously allowed plaintiffs to introduce into evidence WMATA's contradictory statements and conduct under the insurance policy.

far in excess of the caps in the settlement agreement. This award was contrary to the facts and the law.[3]

In support of their claims, Ernst/PMA and Truland/Liberty asserted that the recovery of prejudgment interest and attorneys' fees in litigating this action are not claims for damages "against the policy". This contention has no basis in fact, law, or logic. The claims made by Ernst/PMA and Truland/Liberty sought to recover damages under the Lumbermens' policy and nowhere else. As this Court has held, prejudgment interest is a substantive claim going to the merits of the action. Osterneck v. Ernst & Whinney, 489 U.S. 169, 175-76 (1989). Thus, a claim for prejudgment interest cannot be said to be collateral to these plaintiff's claims against the Lumbermens' policy; rather, it arises directly from the policy. Id. The same logic applies to the claims for attorneys' fees in this action. When the settlement agreement was executed, Ernst/PMA and Truland/Liberty knew or should have known of their payments in the underlying cases, and knew that they would be incurring and claiming damages for attorneys' fees in litigating this action. Despite that knowledge, they did not exclude attorneys' fees and prejudgment interest from the Settlement Agreement nor did they simply recite in the Settlement Agreement that the cap was only applicable to settlement fees and costs incurred in the underlying actions. Instead, they inserted a specific dollar figure that was *greater than* the total of their actual fees and costs. The court of appeals's failure to reverse the trial court's decision and to order that the respondents' recovery be limited to the caps contained in the settlement agreement was contrary to well-established law of this Court as pronounced in Osterneck, and this Court should grant Lumbermens' petition in order to remedy the lower courts' misreading of the applicable law.

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[3] The court of appeals dismissed Truland's and Ernst's claims. As explained herein, the recoveries of PMA and Liberty should have been limited by the settlement agreement.

C. The lower courts erred in their determination that the substantive law of the State of Maryland, rather than that of the District of Columbia, governs this case.

This Court has recognized the importance of the determination by the trial court of choice of law in diversity cases. It cannot be disputed that the forum state's choice of law provisions determine which state's substantive law is applicable. Klaxon Company v. Stentor Electric Manufacturing Company, 313 U.S. 487 (1941); Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3 (1975).

The determination of which jurisdiction's substantive law applies to this case is crucial, because the law of the District of Columbia, contrary to that of the State of Maryland, does not permit the recovery of attorneys' fees and costs in pursuing a declaratory judgment action against an insurer. The trial court improperly ruled that Maryland law applied to this action. This ruling, which was not addressed by the court of appeals, is contrary to the facts of record and the law.

The trial court's ruling was based upon its understanding that Maryland was the principal location of the insurance risk; however, that belief is not determinative of the issue. The other facts of record compel the conclusion that the law of the District of Columbia should apply.[4] The insurance policy at issue was negotiated, executed, and issued in the District of Columbia. WMATA, the principal insured, has its office in the District of Columbia. The majority of the heavy construction work involving the subway system occurred in the District of Columbia. Although the system extended into Maryland and Virginia, the principal location of the risk was in the District of

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[4] The filing of this action is an admission by respondents that "a substantial part of the events or omissions giving rise to the claim" occurred in the District of Columbia, since none of the other venue provisions are applicable. 28 U.S.C. §1391.

Columbia where the majority of the tunneling and complex construction work occurred.[5]

In basing its decision on the location of the underlying accident, the trial court improperly ignored the applicable law of the District of Columbia, which holds that the place of the accident is not determinative of choice of law issues involving the construction of an insurance policy. Gray v. Grain Dealers Mutual Ins. Co., 276 App. D.C. 388, 871 F.2d 1128, 1130 (D.C. Cir. 1989) ("That the accident occurred in the District . . . is not enough to override North Carolina's superior interest in the construction of the insurance contract.") Further, in an insurance coverage action, it is the principal location of the insured risk during the term of the policy that is most significant for choice of law purposes. National Union Fire Ins. Co. of Pittsburgh v. Binker, 665 F. Supp. 35, 39-40 (D.D.C. 1987). In the instant case, the only fact of record that militates against the application of District of Columbia substantive law is the situs of the occurrence. This, however, is insufficient to overcome the other facts which demonstrate unequivocally that the principal location of the risk was in the District of Columbia. Consequently, the court of appeals erred in not addressing and correcting the district court's misapplication of the law of the District of Columbia. It is of extreme importance that this Court review that decision and rectify this error, since a substantial portion of the damages awarded against Lumbermens was governed solely by the trial court's decision as to choice of law. The importance of this issue is not limited to the litigants, because the issue of choice of law between Maryland and the District of Columbia is one that frequently arises in the courts of both jurisdictions, due to the proximity of the jurisdictions.

IV. The Questions Presented Are Important.

Although the issues involved in this case, on their face, may appear to be important only to the litigants, that is not the case. Rather, this case involves issues that are of importance to

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[5] The trial court refused to permit testimony about the principal location of the risk; counsel for Lumbermens proffered that the testimony would have been that the District of Columbia was the principal location. A230.

litigants in general, as evidenced by the decisions of this Court cited herein. Of all of the erroneous rulings cited, perhaps the most egregious is that of the court of appeals in failing to articulate any reasons for its refusal to address Lumbermens' arguments on appeal. As discussed above, this Court has emphasized the importance of an appellate court's de novo review of the applicable state law. Salve Regina College, 499 U.S. at 231. Contrary to this Court's mandate, the court of appeals's opinion provides no evidence that the court gave any consideration whatsoever to reviewing the district court's decisions on state law. Coupled with the district court's erroneous rulings, the court of appeals's failure to conduct a review of the law compels the conclusion that this Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel of Record

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-7241 **September Term, 1998**

Liberty Mutual Insurance Company, Truland Corporation, S.J. Groves & Sons Company, and Granite Construction Company,

Appellees,

v.

Lumbermen's Mutual Casualty Company,

Appellant

Appeal from the United States District Court
for the District of Columbia
(No. 89cv02046)
(Filed January 20, 1999)

Before: Silberman, Ginsburg and Sentelle, *Circuit Judges.*

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. The court has determined that the issues presented occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). It is

ORDERED AND ADJUDGED that the judgment of the district court be affirmed in part and reversed in part, and this matter be remanded to the district court for further proceedings, all in accordance with the attached memorandum opinion.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

FOR THE COURT:
Mark J. Langer, Clerk
BY: S/Eva Brown
Deputy Clerk

MEMORANDUM

Appellant Lumbermens Mutual Casualty Co. entered into an insurance agreement with the Washington Metropolitan Area Transit Authority that covered losses arising out of the WMATA's construction of a subway station. When the contractors who built the station, appellees Truland Corp., S.J. Groves & Sons Co., Granite Construction Co., and E.C. Ernst, were sued by victims of an accident that occurred there, they sought indemnification from Lumbermens. When Lumbermens refused to pay, appellees, joined by their direct insurers, sued and won a jury verdict. Lumbermens appeals, claiming that the verdict was tainted by a variety of errors committed by the trial court.

Two, but only two, of Lumbermens' arguments have merit. First, contrary to the court's holding, the question whether the appellees are entitled to recover the attorneys' fees they paid in settling the underlying tort actions must be resolved by a jury. It is true that when parties contract to abrogate the "American rule," i.e. to place upon the losing party the entire cost of any legal action arising out of their agreement, the amount of the fees thereby shifted is determined by the court. *See McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1313 (2d Cir. 1993). When a plaintiff seeks attorneys' fees not pursuant to the fee-shifting provision of a contract but as an element of its compensatory damages, however, the issue is one for the jury. *See Simler v. Conner*, 372 U.S. 221, 223 (1963) (attorney's claim that former client's failure to pay fee constituted breach of retainer agreement must be tried to jury); *Eureka Investment Corp. v. Chicago Title Ins. Co.*, 743 F.2d 932, 942 (D.C. Cir. 1984) ("[I]n a private damages action, the court is not asked to set the attorney's fees. Rather, once a finding of liability for attorney's fees has been made, the role of the trier of fact is the same as in any other case involving a claim for expenses as consequential damages").

Second, because appellees Truland Corp. and E.C. Ernst were fully compensated for their losses by their direct insurers, they were not "real part[ies] in interest" for purposes of Fed. R. Civ. P. 17(a). Lumbermens' motion to dismiss them from the case therefore should have been granted. *See United States v. Aetna Surety Co., 338 U.S. 366, 380-81 (1949)* ("If [a] subrogee has paid an entire loss suffered by [its] insured, it is the only real party in interest").

For the foregoing reasons, the judgment of the district court is vacated and this matter is remanded to that court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY MUTUAL	*	
INSURANCE COMPANY,	*	
et al.,	*	
	*	**Civil Action No. 89-2046 (JHG)**
Plaintiffs,	*	**(Filed December 21, 1995)**
v.	*	
LUMBERMENS MUTUAL	*	
CASUALTY COMPANY,	*	
Defendant.	*	

* * * * * * * *

MEMORANDUM OPINION AND ORDER

This Memorandum Opinion and Order marks the third occasion upon which the Court has had the opportunity to consider whether summary judgment should be entered in this declaratory judgment action.[1] Upon careful review of plaintiffs' and defendant's motions for summary judgment, the motions are denied for the reasons set forth below.

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[1] On October 7, 1991, the Court granted summary judgment in favor of plaintiffs. Lumbermens appealed the Court's ruling on November 1, 1991. On March 18, 1993, Lumbermens' appeal was dismissed for lack of appellate jurisdiction. Subsequently, on August 18, 1994, the Court denied a motion for summary judgment by certain plaintiffs, and in so doing, reconsidered a portion of its earlier Memorandum Opinion and Order. In September 1994, the parties embarked upon further discovery, and commenced mediation. At the parties' request, mediation was extended until May 1995, and discovery was extended until July 31, 1995. Plaintiffs subsequently filed the instant motion for summary judgment. Finally, in October 1995, Lumbermens filed its motion for summary judgment. Thus, while proceedings in this case have indeed spanned a number of years, it has been under active consideration throughout.

I. BACKGROUND

The background of this case was set forth in the Court's Memorandum Opinion and Orders of October 7, 1991 and August 18, 1994, and will not be repeated here except in summary fashion.

Plaintiff's Liberty Mutual Insurance Company ("Liberty") Truland Corporation ("Truland"), S. J. Groves & Sons Company ("Groves"), Granite Construction Company ("Granite") , the Philadelphia Bourse, Inc. d/b/a Ernst ("Ernst"), and Pennsylvania Manufacturers Association Insurance Group ("PMA Insurance Group") brought this action against defendant Lumbermens Casualty Company ("Lumbermens")[2] based on Lumbermens' denial of coverage for liability arising from an electrical-related accident at the Addison Road Metro Station on June 4, 1987. Granite and Groves, operating as a joint venture (Granite-Groves), were general contractors on the construction of the Addison Road station; Ernst and Truland were subcontractors.

According to plaintiffs, Lumbermens was required to provide coverage for the incident pursuant to an insurance policy for "continued operations" coverage at the Addison Road station. That coverage was limited to three years:

> following the time when all operations to be performed by a named insured having a general or prime contract with WMATA have been completed and such contract has been accepted by WMATA but only with respect to those operations under the completed and accepted contract.

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[2] Washington Metropolitan Area Transit Authority was initially a defendant, but the claims against WMATA were dismissed in the Court's October 7, 1991 Memorandum Opinion and Order, and were never reinstated.

Endorsement 7A. The policy defines the term "completed operations" but does not define the term "accepted."

Plaintiffs contend that "acceptance" of the contract occurred on June 8, 1984, when an authorized representative of WMATA's contracting officer, John F. McElhenny ("McElhenny"), sent a letter to the president of Granite-Groves, which stated, *inter alia*, "This letter is to advise you formally of the Authority's acceptance of the contract." Accordingly, under plaintiffs' view, continued operations coverage would have been in effect on June 4, 1987, when the incident occurred. Lumbermens challenges plaintiffs' interpretation of the contract and insists that the contract was accepted on September 7, 1979, when WMATA and Granite-Groves executed a "Certificate of Substantial Completion" for the contract. Under Lumbermens' view, obviously, continued operations coverage would have ceased long before the June 4, 1987 incident.

Accordingly, this case turns on the proper construction of the term "accepted" in the insurance policy. In its previous Memorandum Opinion and Orders, the Court held that because the term was subject to a number of possible interpretations, it was ambiguous. Contending that Lumbermens has no extrinsic evidence clarifying the meaning of the term "accepted," plaintiffs urge the Court to construe the term against Lumbermens, the drafter of the language in question, and to find that "acceptance" occurred on June 8, 1984, when McElhenny sent the above-mentioned letter to Granite-Groves. Lumbermens, on the other hand, argues that extrinsic evidence supports its interpretation of the term "acceptance," or at least raises a genuine issue of material fact precluding summary judgment. Although the question is a close one, the Court is compelled to agree with Lumbermens that summary judgment is inappropriate.

II. ANALYSIS

Summary judgment is appropriate when there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "The inquiry performed is the threshold inquiry of determining whether there is a need for trial -- whether, in other words, there are any genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). In considering a motion for summary judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. At the same time, however, Rule 56 places a burden on the nonmoving party to "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

As stated previously, because the term "accepted" is ambiguous, the Court may consider extrinsic evidence to determine the intent of the parties with respect to what constitutes "acceptance" of the contract. *Truck Ins. Exchange v. Marks Rentals, Inc.*, 418 A.2d 1187, 1190 (Md. 1980).[3] "[R]esort may be had to the facts and circumstances attendant

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[3] In its opposition to plaintiffs' Motion for Summary Judgment, Lumbermens revisits the issue of whether Maryland or District of Columbia law should apply to this case. "The validity of a contract of . . . insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk," unless some other state has a more significant relationship. Restatement (Second) of Conflicts of Laws § 193 (1971). In keeping with that general rule, the Court has twice ruled that because the location of the risk was unquestionably Maryland, Maryland law applies to this case. The Court sees no reason for disturbing its prior rulings on this issue. In any case, neither the Court's analysis nor its conclusion would be significantly altered if considered under District of Columbia law.

at the time the insurance was effected, to aid the interpretation. . . . Conversations between the parties had at the time the insurance was effected may be competent" to determine the intent of the parties. *Couch on Insurance 2d* § 15:58 (1984).

Plaintiffs submit that Lumbermens has offered no extrinsic evidence to clarify the meaning of the term "acceptance," and consequently, the term should be construed against Lumbermens, as drafter of the language. Unquestionably, "an insurance contract that is still ambiguous, after the court has considered any extrinsic or parol evidence, will be construed against the insurer as the drafter of the policy." *Nationwide Mutual Ins. Co. v. Scherr*, 647 A.2d 1297, 1300 (Md. App. 1994); *See also Couch* § 15.74 at 345-347 (same).

In support of their respective motions, both plaintiffs and defendant have offered a plethora of evidence concerning the parties' actions under the contract. While interesting for purposes of gaining a fuller understanding of the course of events, the probativeness of that evidence to the question of the parties' intent at the time the agreement was reached is not great. *See Couch* § 15.58 ("If the language used is ambiguous and obscure and does not in itself disclose the intent, then resort may be had to [extrinsic evidence], <u>although not to subsequent circumstances</u>") (emphasis added).

The extrinsic evidence bearing on the intent of the parties <u>at or around the time the contract was entered</u> is not substantial, and consists primarily of two statements by Samuel Asquith, who participated in the contract negotiations on behalf of Lumbermens. In its August 1994 Memorandum Opinion and Order, the Court found significant an affidavit by Asquith, in which Asquith stated that "[i]t was the intent of all parties . . . that [the] completed operations coverage begin at an undisputable point in time at the conclusion of the work and prior to the start-up of revenue producing operations." Asquith Aff. ¶ 6. However, as plaintiffs point out in their

motion, the significance of Asquith's affidavit is undermined by his deposition testimony, wherein Asquith admitted that he could not speak to WMATA's intent regarding the meaning of the term "accepted." *See* Pl. Exh. 2 (Asquith deposition) at 115-116. Plainly, these statements are contradictory, and Asquith admitted as much in the course of his deposition. However, evaluation of Asquith's statements and a determination of the weight to be given thereto is a matter that cannot be performed by the Court on summary judgment.

Additionally, in his deposition Asquith made another statement which, when viewed in the light most favorable to Lumbermens as the non-moving party, precludes entry of summary judgment for plaintiffs. When asked whether there were any discussions by the parties to the negotiations concerning the issue of a gap in insurance coverage between coverage for the construction phase of the contract and "continued operations" coverage, Asquith responded:

> Yes. I think that the parties, Lumbermens, Johnson & Higgins, the authority itself, had no intention of creating any gap in the insurance for the construction.

Pl. Exh. 2 at 139.[4]

Under the policy, construction is deemed complete at the earliest of three possible times, one being "when the portion of the work out of which the injury or damage arises has been put to its intended use," in other words, when WMATA commences revenue producing operations. Pursuant to Endorsement C to the underlying policy, the policy did not cover "damage arising out of revenue producing operations of

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[4] Another individual, Dolores Callier, testified in her deposition that "the intent was always that completed operations coverage would commence when the physical construction activity was complete." Def. Exh. 30 at 190. However, because it is unclear whether Callier had any role in the contract negotiations, the relevance of her statement to the meaning of the contract in question is uncertain.

the transit system." Def. Exh. 2. Accordingly, if the parties intended to avoid a gap in coverage between the construction and continued operations phases, then "acceptance", and commencement of continued operations coverage, would need to occur prior to, or at least contemporaneous with the start of revenue producing operations in November 1990.[5] The certificate of substantial completion, which Lumbermens asserts represented "acceptance" of the contract, was issued in September 1979, 14 months prior to the start of revenue producing operations.

Granted, Asquith's testimony and the favorable inferences drawn therefrom do not illuminate precisely the meaning of the term "acceptance." Still, when construed in the light most favorable to Lumbermens, the evidence could reasonably be viewed as supporting Lumbermens' position that the parties intended for continued operations coverage to commence at a point in time substantially earlier than plaintiffs contend, and possibly at the time of issuance of the certificate of substantial completion.[6]

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[5] Indeed, Lumbermens points out that under plaintiffs' view, if McElhenny had never sent the letter in 1984, continued operations coverage would never have commenced.

[6] Plaintiffs contend that this testimony does not make clear the parties' intent with regard to the term "acceptance," and as such, they urge the Court to enter judgment in plaintiffs' favor due to Lumbermens' failure to offer extrinsic evidence making clear the meaning of the term "acceptance." It appears to the Court that plaintiffs have taken an overly narrow view of the type of extrinsic evidence which may be considered in attempting to discern a contract's meaning. Obviously it would be preferable to have extrinsic evidence of discussions directly concerning the term "acceptance". However, the term "extrinsic evidence" is not so narrow as to make discussions concerning a desire to not have a gap in insurance coverage between the "construction" phase and the "continued operations" phase irrelevant to what the parties meant by the term "acceptance."

It is possible, of course, that a jury will decide that Asquith's testimony is not credible or has no bearing on the meaning of the term "acceptance." However, that is a determination that the Court simply cannot make as a matter of law.

Accordingly, because the meaning of the term "acceptance" depends on "the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence," summary judgment is inappropriate, because such a determination must be made by the trier of fact. *Restatement (Second) of Contracts* § 212 (1981); *See also Truck Ins. Exchange v. Marks Rentals, Inc.*, 418 A.2d 1187, 1190 (Md. 1980) ("if disputed factual issues are presented by the evidence bearing upon the ambiguity, construction of the contract is for the jury"); *Pacific Indemnity Co. v. Interstate Fire & Casualty Co.*, 488 A.2d 486, 489 (Md. 1985) (same). As the Court of Appeals of Maryland has explained, where a contract term is ambiguous,

> extrinsic evidence is admissible at trial to show the parties' intent and to show whether the term does or does not have a particular trade usage. And if the ambiguity is not resolved by extrinsic evidence, rules of construction [such as the language being construed against the insurer] are applicable.

St. Paul Fire & Marine Ins. Co. v. Pryseski, 438 A.2d 282, 288 (Md. 1981). "If the trial court is unable to resolve the ambiguity upon the evidence introduced, if any, then the ambiguity should be resolved against . . . the party preparing the contract." *Id.* at 289. However, resolution of this matter must await trial.

III. CONCLUSION

For the foregoing reasons, it is

ORDERED that plaintiffs' motion for summary judgment is denied; and it is

FURTHER ORDERED that defendant's motion for summary judgment is denied.

By agreement of all parties, this case has been assigned to Magistrate Judge Robinson for trial, to be by jury unless the parties elect otherwise.[7] Accordingly, pretrial and trial dates will be arranged by Magistrate Judge Robinson. The Court extends her appreciation to Magistrate Judge Robinson for her assistance on this case.

IT IS SO ORDERED.

December 21, 1995.

S/ Joyce Hens Green

JOYCE HENS GREEN
UNITED STATES
DISTRICT JUDGE

[7] Both sides agree that there is no factual dispute concerning the issuance of the certificate of substantial completeness in September 1979, the sending of the June 8, 1984 letter, or many other background facts in this dispute. Presumably the parties will be agreeable to stipulating to most of the facts in question, leaving for the jury only the questions of (1) whether extrinsic evidence clarifies the parties' intentions concerning the meaning of the term "acceptance" and (2) on which of the dates in question "acceptance" occurred.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY MUTUAL INSURANCE COMPANY, et al.,	)	
Plaintiffs,	)	
v.	)	C. A. No. 89-2046 (JHG)
	)	Magistrate Judge Robinson
LUMBERMENS MUTUAL CASUALTY COMPANY, ET AL.	)	(Filed November 1, 1996)
Defendants.	)	

ORDER

Upon consideration of Lumbermens Mutual Casualty Company's Motion In Limine Concerning Choice Of Law (Docket No. 155) Plaintiffs' Opposition thereto and Defendant's Reply, it is this 1st day of November, 1996,

ORDERED that the Defendant's Motion is DENIED.

S/Deborah A. Robinson
UNITED STATES MAGISTRATE JUDGE
Deborah A. Robinson

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY MUTUAL INSURANCE COMPANY, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 89-2046 (DAR)
	)	Magistrate Judge Robinson
LUMBERMENS MUTUAL CASUALTY COMPANY,	)	(Filed November 1, 1996)
Defendant	)	

ORDER

UPON CONSIDERATION of Lumbermens Mutual Casualty Company's Motion To Dismiss Or, In The Alternative Motion For Summary Judgment As To Claims Asserted By Plaintiffs, E.C. Ernst, Truland Corporation And Granite Construction Co. filed herein (Docket No. 158), the Opposition thereto and Defendant's Reply, it is this 1st day of November, 1996, by the United States District Court for the District of Columbia,

ORDERED, that Lumbermens Mutual Casualty Company's Motion To Dismiss Or, In The Alternative Motion For Summary Judgment As To Claims Asserted By Plaintiffs, E.C. Ernst, Truland Corporation, And Granite Construction Co. be, and hereby is, DENIED; it is further

ORDERED, that Lumbermens, through its counsel or any witness, shall make no reference before the jury to the existence of any insurance coverage applicable to the plaintiffs in this matter; and it is further

ORDERED, that there shall be no reference before the jury in this matter to the party plaintiffs Liberty Mutual Insurance Company and Pennsylvania Manufacturers Association Insurance Group.

S/ Deborah A. Robinson
Deborah A. Robinson
United States Magistrate Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY MUTUAL INSURANCE COMPANY, ET AL.,	DOCKET NO. CA 89-2046
PLAINTIFFS,	COURTROOM NO. 5 WASHINGTON, D.C.
VS,	NOVEMBER 4, 1996
LUMBERMENS MUTUAL CASUALTY COMPANY, ET AL.,	9:55 A.M.
DEFENDANTS	

TRANSCRIPT OF TRIAL (DAY 1)
BEFORE THE HONORABLE DEBORAH A. ROBINSON,
U.S. MAGISTRATE JUDGE, AND A JURY

APPEARANCES:
(SEE PAGE 2.)

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(COMPUTER-AIDED TRANSCRIPTION FROM STENOTYPE NOTES.)

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[p. 66] NEED TO MAKE THAT COMMENT NOW. I'LL LEAVE IT TO THE COURT AS TO HOW YOU WANT ME TO HANDLE THAT. I THINK YOU INDICATED -- INQUIRED OF MR. FELT WHETHER OR NOT YOU EVEN NEEDED TO ADDRESS THE PRE-NOTICE FEES ISSUE IF THE COURT BIFURCATED THE ATTORNEYS' FEES ISSUE, AND I DO HAVE A BRIEF COMMENT, BUT I DON'T NEED TO MAKE IT NOW, IF THE COURT PREFERS.

THE COURT: VERY WELL, YOU NEED NOT MAKE IT NOW.

ANYTHING FURTHER BEFORE WE RECESS? THANK YOU.

(11:35 RECESS 11:53)

THE COURT: NOW THE COURT HAS DECIDED THE PENDING MOTIONS AS FOLLOWS: FIRST, WITH RESPECT TO THE MOTION DOCKETED NO. 152, PLAINTIFFS' MOTION TO ESTABLISH THAT THE JURY IS CHARGED WITH DECIDING ONLY WHETHER EXTRINSIC EVIDENCE CLARIFIES THE PARTIES' INTENTIONS CONCERNING THE MEANING OF THE TERM "ACCEPTED," THE MOTION IS GRANTED, AND THE COURT WILL PROVIDE THE JURY WITH A FORM, WHICH WE WILL CALL A SPECIAL VERDICT FORM, WITH THE TWO QUESTIONS IDENTIFIED BY JUDGE GREEN IN HER MOST RECENT MEMORANDUM OPINION.

THE MOTION DOCKETED NO. 152, PLAINTIFFS' MOTION IN LIMINIE TO PRECLUDE TESTIMONY RELATING TO WHETHER WMATA WILL ULTIMATELY BE LIABLE, IS GRANTED, THE COURT FINDING THAT THE ISSUE OF WMATA'S ULTIMATE LIABILITY IS NOT RELEVANT TO ANY ISSUE TO BE DETERMINED BY THE JURY IN THIS CASE.

MR. FENNELL: YOUR HONOR, YOU MENTIONED 152. ON OUR LIST IT'S 150.

[p. 67] THE COURT: 150, THANK YOU.

YOUR MOTION DOCKETED NO. 151, PLAINTIFFS' MOTION IN LIMINE TO LIMIT TESTIMONY FROM MESSRS. ASQUITH, ERICKSON AND SEWALL IS GRANTED. AND, FURTHER, THE COURT ORDERS THAT THEY MAY NOT OFFER THEIR OPINIONS REGARDING THE PARTIES' INTENTION, AND MAY TESTIFY ONLY AS FACT WITNESSES TO WHAT THEY RECALL OF THE CONTRACT NEGOTIATIONS.

YOUR MOTION DOCKETED 154, PLAINTIFFS' MOTION IN LIMINE TO PRECLUDE TESTIMONY OF THE UNILATERAL UNCOMMUNICATED INTENT OF THE NEGOTIATING PARTIES, IS GRANTED, FOR THE REASONS OFFERED BY THE PLAINTIFFS IN THE MOTION.

THE PLAINTIFFS' MOTION TO BIFURCATE THE TRIAL, THAT IS, THE MOTION DOCKETED AS 153, IS GRANTED.

AND THE MOTION DOCKETED 156, LUMBERMENS' -- THE DEFENDANT'S MOTION IN LIMINE TO EXCLUDE PLAINTIFFS' CLAIM FOR PRE-NOTICE ATTORNEYS' FEES AND LITIGATION COSTS WILL BE STAYED PENDING THE DETERMINATION OF THE CASE OF THE MERITS.

THE MOTION DOCKETED NO. 159, WHICH HAS A LENGTHY CAPTION THAT THE COURT WILL NOT RECITE AT THIS TIME, DEFENDANT'S MOTION IN LIMINE TO PRECLUDE INTRODUCTION OF CERTAIN OF WMATA'S INTERROGATORY ANSWERS AND DOCUMENTS AUTHORED AFTER THE DATE OF THE INSURANCE POLICY, IS DENIED, FOR THE REASONS OFFERED BY THE PLAINTIFFS IN THEIR OPPOSITION.

AND, FINALLY, THE MOTION DOCKETED 161, LUMBERMENS' MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF PLAINTIFFS' [p. 68] EXPERTS, IS DENIED. HOWEVER, THE COURT ORDERS THAT NO TESTIMONY MAY BE ELICITED FROM THEM REGARDING THE INTENT OF THE CONTRACTING PARTIES.

NOW, I WILL ASK WHETHER COUNSEL BELIEVE IN A BRIEF RECESS THEY MIGHT BE ABLE TO AGREE UPON APPROPRIATE TIME LIMITS WHICH WOULD ALLOW THE CASE TO BE COMPLETED THIS WEEK, OR SHOULD THE COURT HEAR FROM YOU SEPARATELY CONCERNING WHAT LIMITS YOU INTEND TO IMPOSE UPON YOURSELVES?

MR. FENNELL: YOUR HONOR --

THE COURT: DO YOU WISH A MOMENT TO SPEAK, ALL OF YOU?

MR. FENNELL: I THINK WE HAVE SPOKEN ON OUR SIDE.

THE COURT: VERY WELL, I'LL HEAR FIRST FROM YOU.

MR. FENNELL: YOUR HONOR, WE, IN OUR CASE IN CHIEF, AT THIS POINT HAVE TWO LIVE WITNESSES WHO ARE WITNESSES FROM OUR PARTIES; WE HAVE TWO INDIVIDUALS WHO WORK WITH WMATA, WHO WE WILL PROBABLY CALL AS ADVERSE WITNESSES; AND WE HAVE TWO DEPOSITIONS, PORTIONS OF THEM, THAT WE WANT TO HAVE READ IN, AND THEN WE HAVE OUR TWO EXPERTS, MR. GOTTENHEIMER AND MR. PETER.

THE COURT: LET ME ASK YOU JUST ONCE. HAVE THOSE NAMES BEEN PROVIDED TO MR. DEUTSCH EARLIER THIS MORNING?

MR. FENNELL: YES, YOUR HONOR. AND THE READ-IN OF THE DEPOSITIONS WOULD BE PORTIONS OF ERICKSON AND ASQUITH, THEY'RE BOTH OUTSIDE OF THE SUBPOENA POWER OF THE COURT.

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

S.J. GROVES, INC., et al.,
Plaintiffs,
v.
LUMBERMAN'S MUTUAL CASUALTY COMPANY,
Defendant.

CA 89-2046

Washington, D.C.
November 13, 1996
9:12 a.m.

Volume VII
Transcript of Trial
Before the Honorable Oliver Gasch
United States Magistrate Judge, and a jury

APPEARANCES:

For the Plaintiffs: STEVE FENNELL, ESQ.
ANTHONY BRESCHI, ESQ.

For the Defendant: EDWARD J. LOPATA, ESQ.

Court Reporter: ELIZABETH L. WASSERMAN
Miller Reporting Company, Inc.
507 C Street, N.E.
Washington, D.C. 20002
(202) 546-6666

[p. 13] expression "if you find" or "if you decide," I mean you must be persuaded, considering all the evidence in the case, that the proposition is more probably true than not true.

In this case, Lumberman's bears the burden of proving by a preponderance of the evidence that the parties to the insurance policy had a mutual intent as to the meaning of the phrase, "and such contract has been accepted by WMATA" at the time the completed operations endorsement was issued on July 30, 1971. If you find that Lumberman's has failed to meet its burden, then you must find for the Plaintiffs.

To establish by a preponderance of the evidence means to provide that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has the more convincing force and produces in your mind's belief that what is sought to be true is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses regardless of who may have called [p. 14] them, and all exhibits received in evidence regardless of who may have produced them.

As a general rule of contract construction, each and every sentence, clause and word of contract should be given operative effect. Since it must be assumed that each word contained in an insurance policy is intended to serve a purpose, every term will be given effect if that can be done by any reasonable construction.

An insurance policy is to be interpreted with the words and terms given their customary and usual meanings. When terms are ambiguous, the resolution of the language in the policy must be interpreted against the insurance company.

However, in resolving the meaning of the ambiguous terms, you must consider the other evidence and testimony in this case concerning the intention of the parties.

In this case the Court has found the phrase "and such contract has been accepted by WMATA" to be ambiguous. As jurors, it is your responsibility to decide whether that ambiguity can be resolved. In order to do so, you must consider whether the parties to the Lumberman's insurance policy had a mutual intent as to the meaning of the phrase on July 30, 1971, the time the completed operations endorsement was issued.

If you cannot determine the parties' mutual intent, or if you find that the parties did not have a [p. 15] mutual intent, then you must find for Plaintiffs. If you find that Lumberman's understanding of the meaning of the phrase "and such contract has been accepted by WMATA" was not made known to Plaintiffs, then you must find for Plaintiffs.

You may consider evidence of the customs and usages in the insurance and construction industries as an aid in determining what the parties intended by the phrase "and such contract has been accepted by WMATA." In other words, if you find that the concept of acceptance of a contract has a particular meaning as is customarily used in the construction and/or insurance industries, then you may consider such evidence in determining what the respective parties intended by the use of the phrase "and such contract has been accepted by WMATA."

Now, some final instructions concerning your verdict and your deliberations otherwise.

First, the verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. You must decide the case for yourself,

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

S.J. GROVES, INC., et al., **Plaintiffs,** **v.** **LUMBERMENS MUTUAL CASUALTY COMPANY,** **Defendant.**	**Civil Action No. 89-2046** **DAR** **(Filed November 13, 1996)**

VERDICT FORM

(1) Has the Defendant met its burden of proving:

(a) that those negotiating the language of the completed operations endorsement to the insurance policy in July 1971 had a mutual intent at the time as to the meaning of the phrased "and such contract has been accepted by WMATA"?

Yes _____ No _____

(b) that Defendant's understanding of the meaning of the phrase "and such contract has been accepted by WMATA" was made known to Plaintiffs?

Yes _____ No _____

If you answered "No" to either question (1) (a) or (b), or both, do not answer question (2).

(2) Do you find that the parties mutually intended the Addison Road contract to have been "accepted by WMATA" on:

(a) June 8, 1984 Yes _____ No _____

(b) September 7, 1979 Yes _____ No _____

Dated: _____ _____

Signature of Foreperson

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY MUTUAL INSURANCE COMPANY., et al.,.

Plaintiffs,

v.

LUMBERMENS MUTUAL CASUALTY COMPANY,

Defendant.

Civil Action No. 89-2046
DAR
(Filed August 6, 1997)

ORDER

Plaintiffs are contractors and subcontractors that participated in the construction of the Addison Road Metro Station. In 1989, plaintiffs filed this action, in which they sought a declaration that they were entitled to insurance coverage under a wrap-up insurance policy, procured by the Washington Metropolitan Area Transit Authority from defendant, for claims arising from an accident at the Addison Road Metro Station on June 4, 1987. Following a two-week trial, the jury, on November 13, 1996, found that the parties who negotiated the policy did not have a mutual intent regarding the meaning of the term "accepted" in the completed operations endorsement of the policy. Consistent with the verdict, the term "accepted" must be construed against defendant and in favor of coverage for plaintiffs.

Plaintiffs now seek an award of damages consisting of the costs of settlement of the underlying tort litigation and attorneys' fees and expenses, including interest, incurred since the initiation of the first underlying tort suit in 1987. *See* Plaintiffs' Motion for Judgment on Damages (Docket No.

196) at 1. In the plaintiffs' joint submission, plaintiff S. J. Groves and Sons, Inc. ("S.J. Groves") seeks a total of $1,811,745.20; plaintiff Granite Construction Company ("Granite") seeks a total of $966,346.33; Truland Corporation ("Truland") and Liberty Mutual Insurance Company ("Liberty Mutual") seek a total of $314,000.96; and E.C. Ernst ("Ernst") and the Pennsylvania Manufacturers Association Insurance Group ("PMA") seek $320,694.28. *See* Memorandum of Point and Authorities in support of Plaintiffs' Motion for Damages ("Plaintiffs' Memorandum") at 2. Plaintiffs Ernst and PMA supplemented the motion to increase the amount sought to $346,970.25 (Docket No. 205); plaintiffs S.J. Groves and Granite have supplemented the motion to seek an additional $79,128.85. Plaintiffs support their demand by the declarations of counsel, billing records and other documentation.

Defendant does not dispute the reasonableness of the amounts paid for settlement of the underlying tort actions. Lumbermens Mutual Casualty Company's Opposition to Plaintiffs' Motion for Judgment on Damages ("Defendant's Opposition") at 1; See Plaintiffs' Memorandum at 5. Instead, defendant maintains that plaintiffs have failed to prove the reasonableness and necessity of the fees and costs incurred in their defense of the underlying tort actions and in the prosecution of the instant declaratory judgment action. Defendant's Opposition at 1-2. Additionally, defendant disputes plaintiffs' entitlement to prejudgment interest and to recovery of amounts in excess of the amounts claimed by plaintiffs in their pretrial statements. Id. at 2. Further, defendant contends that plaintiff Granite has not suffered any losses, and is not entitled to recover any damages. Id. at 1, n. 1; see Lumbermens Mutual Casualty Company's Opposition to Plaintiffs' S.J. Groves & Sons, Inc. and Granite Construction Company's Supplement to Motion for Judgment on Damages at 4-5. Defendant "does not waive its claim of entitlement to a jury trial on the damages[,]" nor its

"objections to the method chosen by the Court to decide the issue of damages." Defendant's Opposition at 9-10.

Finally, defendant moves to strike portions of plaintiffs' reply to defendant's opposition to plaintiffs' motion judgment on damages, as well as the supplements to plaintiffs' motion filed by plaintiffs Ernst, PMA, S.J. Groves and Granite. *See* Motion to Strike Portions of Plaintiffs' Reply to Lumbermens' Opposition to Plaintiffs' Motion for Judgment on Damages and Ernst's and PMA's Supplement to Motion for Judgment on Damages (Docket No. 207); Motion to Strike Plaintiffs', S.J. Groves & Sons, Inc. and Granite Construction Company's, Supplement to Motion for Judgment on Damages (Docket No. 214). Prior to the commencement of the trial of the instant declaratory judgment action, defendant moved to exclude plaintiffs' claim for pre-notice attorneys' fees and costs. See Lumbermens Mutual Casualty Company's Motion in Limine to Exclude Plaintiffs' Claims for Pre-Notice Attorneys' Fees and Litigation Costs (Docket No. 156). The court stayed consideration of the motion in limine pending the resolution of this action on the merits.

Upon consideration of plaintiffs' motion and the supplements thereto, defendant's motions to strike and motion in limine, the memoranda in support of and in opposition to the four pending motions; and the entire record herein, the undersigned will grant plaintiffs' motion and deny defendant's motions.

DISCUSSION

I. The Right to a Jury Trial

Defendant maintains that it has waived neither "its claim to entitlement" to a jury trial on the issue of attorneys' fee, nor "its objections to the method chosen by the Court" to decide the issue of attorneys' fees. Defendant's Opposition at 9-10. As authority, defendant relies solely upon a 1980 decision of the Court of Appeals of Maryland, in which that court remanded a declaratory judgment action to the trial court "for a proper trial regarding the [fees and expenses] incurred by [plaintiffs.]" See Bankers & Shippers Ins, Co. v. Electro Enterprises Inc., 287 Md.641, 661, 415 A.2d 278, 289 (1980). In its ruling, the Maryland Court of Appeals criticized the "informal hearing" conducted by the trial court on the grounds that the trial court "neither required any real proof of the amount of the fees and expenses claimed, nor provided [defendant] with a realistic opportunity to challenge those fees and expenses." Id. at 661, 288. However, that court did not hold, as defendant suggests here, that a party to a declaratory judgment action has a right to a jury trial on the issue of attorneys' fees and expenses.

In any event, at least three federal courts have subsequently rejected the proposition which defendant urges, and have found that there is no right to a jury trial for determination of attorneys' fees and expenses. See Columbus Mills, Inc. v. Freeland, 918 F.2d 1575, 1578 (11th Cir. 1990); Continental Bank v. Everett, 861 F. Supp. 642, 644-45 (N.D. Ill. 1994); A.G. Becker-Kipnis & Co. v. Letterman Commodities Inc., 553 F. Supp. 118, 121-24 (N.D. Ill. 1982). Relying on one of these authorities, the District of Columbia Court of Appeals aptly observed that

> given "(1) the presumed expertise of courts in matters of attorney fees, (2) the

> inordinate waste of time and expense which would be required to educate lay jurors on those matters about which the court is presumed an expert and (3) the unacceptable expense and delay of bifurcating trials in order to separate issues of liability from lawyer skill and preparedness," we believe that the question of what constitutes a reasonable attorneys' fee, although not entirely incapable of jury resolution, is one better left for the court.

Kudon v. f. m.e. Corporation, 547 A.2d 976, 979 (D.C. 1988) (citations omitted).

To the extent that Bankers & Shippers Ins. Co. v. Electro Enterprises, Inc., the sole authority on which defendant relies, may be read as support for the proposition that "real proof" is required of a party seeking attorneys' fees and expenses, or that an opposing party must be afforded a "realistic opportunity to challenge those fees and expenses," the undersigned finds, for the reasons discussed below, that plaintiffs have more than satisfied their burdens of proof, and that defendant has had a "realistic opportunity" to challenge the fees and expenses sought.

II. The Reasonableness of the Attorneys' Fees and Expenses Sought.

Except with respect to plaintiff Granite, which defendant maintains is not entitled to recover any sum, defendant, in its opposition to plaintiffs' motion for judgment on damages, principally disputes the "necessity and reasonableness" of the attorneys' fees and expenses sought by plaintiffs. For the reasons offered by plaintiffs, the court finds that plaintiffs have demonstrated, in accordance with the well-settled standards articulated by this Circuit, that (1) plaintiffs'

billing rates are reasonable; (2) the number of hours expended by counsel was reasonable; (3) plaintiffs have properly documented their claims; and (4) plaintiffs have not "impermissibly amended" their pretrial statement. See Covington v. District of Columbia, 57 F.3d 1101 (D.C. Cir.) cert. denied, 116 S.Ct. 916 (1996); National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982); Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (D.C. Cir. 1984).

Defendant's opposition consists largely of generalizations—many of which are wholly inapplicable here—regarding the documentation of claims for attorneys' fees and expenses. See Defendant's Opposition at 10-17. In its opposition to plaintiff Granite's request, defendant relies upon the same arguments offered in support of its motion to dismiss or in the alternative, for summary judgment, which this Court (Green, J.) already rejected. See Defendant's Opposition at 38-40. In sum, the undersigned finds that defendant has failed to rebut the reasonableness of attorneys' fees and expenses sought by plaintiffs; to identify even a single element of the request which is not amply documented; to demonstrate that any plaintiff has improperly supplemented its request, or is not entitled to any award of attorneys' fees and expenses. Indeed, except for the "boilerplate" recitation of decisions of this and other courts, defendant's opposition is unsupported by any relevant authorities. Nor has defendant articulated with specificity the basis of its contention that certain elements of the fees and expenses claimed are unreasonable or insufficiently documented.

III. Prejudgment Interest

With no citation of authority, defendant disputes plaintiffs' entitlement to prejudgment interest on the ground that "there has been no showing that any of the plaintiffs have suffered any injury which cannot be compensated by a compensatory award alone." Defendant's Opposition at 33. However, this Circuit has recognized that parties may be entitled to prejudgment interest for delay in compensation. Copeland v. Marshall, 641 F.2d 880, 893 (D.C. Civ. 1980) ("In any event, payment today for services rendered long in the past deprives the eventual recipient of the value of the use of the money in the meantime, which use, particularly in an inflationary era, is valuable."); Knowles v. Mutual Life Ins. Co., 788 F.2d 1038, 1041 (4th Cir.), cert. denied, 479 U.S. 948 (1986) (award of prejudgment interest appropriate where "wrongful refusal to pay deprived [plaintiffs] of the use of the insurance proceeds for more than two years."). Thus, a court, in its discretion, may award prejudgment interest upon consideration of whether prejudgment interest is necessary to fully compensate a plaintiff, and "other fundamental considerations of fairness. "*Osterneck v. Ernst & Whinney,* 489 U.S. 169, 179 (1989).

For the reasons offered by plaintiffs in support of their motion, see Plaintiffs' Memorandum at 20-22, and in accordance with the well-settled precedent, the undersigned finds that plaintiffs are entitled to prejudgment interest on the attorneys' fees and expenses claimed.

CONCLUSION

For the foregoing reasons, it is, this 6th day of August, 1997

ORDERED that (1) Lumbermens Mutual Casualty Company's Motion in Limine to Exclude Plaintiffs' Claim for Pre-Notice Attorneys' Fees and Litigation Costs (Docket No. 156); (2) defendant's Motion to Strike Portions of Plaintiffs' Reply to Lumbermens' Opposition to Plaintiffs' Motion for Judgment on Damages and Ernst's and PMA's Supplement to Motion for Judgment of Damages (Docket No. 207); and (3) defendant's Motion to Strike Plaintiffs', S.J.Groves & Sons, Inc. and Granite Construction Company's, Supplement to Motion for Judgment on Damages (Docket No. 214) are each DENIED; and it is

FURTHER ORDERED that Plaintiffs' Motion for Judgment on Damages (Docket No. 196), as supplemented (Docket Nos. 205, 211) is **GRANTED**, and that plaintiffs are awarded the full amount of the settlement costs, attorneys' fees and expenses, including interest thereon, that they have incurred to date.

S/ Deborah A. Robinson
DEBORAH A. ROBINSON
United States Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY MUTUAL INSURANCE COMPANY, et al.,

Plaintiffs,

v.

LUMBERMENS MUTUAL CASUALTY COMPANY,

Defendant.

Civil Action No. 89-2046
DAR
(Filed November 25, 1997)

ORDER

By an Order entered on August 6, 1997, the court denied defendant Lumbermens Mutual Casualty Company's ("Lumbermens' ") post-trial motions relating to plaintiffs' claims of damages and granted Plaintiffs' Motion for Judgment on Damages. On August 20, 1997, defendant moved for judgment or, in the alternative, to alter or amend judgment or, in the alternative, for a new trial (Docket No. 222). Plaintiffs thereafter moved for entry of monetary judgment (Docket No. 224); defendant moved to strike an affidavit (Docket No 229) and a letter (Docket No. 233) offered by plaintiff Granite Construction Company ("Granite") in opposition to defendant's motion for judgment or, in the alternative, to alter or amend judgment or, in the alternative, for a new trial.

Upon consideration of the motions; the memoranda in support thereof and in opposition thereto; the court's August 6, 1997 memorandum order; the parties' supplemental memoranda concerning the pre-notice expenses and the entire record herein, it is, this 25th day of November, 1997

ORDERED, for all the reasons offered by plaintiffs, that defendant Lumbermens' Motion for Judgment or, in the Alternative, to Alter or Amend Judgment or, in the Alternative, for a New Trial (Docket No. 222) is **DENIED;** and it is

FURTHER ORDERED, for all the reasons offered by plaintiffs, that Plaintiffs' Joint Motion For Entry of Monetary Judgment (Docket No. 224) is **GRANTED,** and monetary judgment is entered in accordance with the Judgment Order of this date; and it is

FURTHER ORDERED, for all the reasons offered by plaintiff Granite, that defendant Lumbermens' Motion to Strike Affidavit of William L. Elkins (Docket No. 229) and Motion to Strike November 3, 1996, CNA Insurance Companies Letter (Docket No. 233) are **DENIED.**

S/ Deborah A. Robinson
DEBORAH A. ROBINSON
United States Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY MUTUAL	:	
INSURANCE COMPANY,	:	
et al.,	:	
Plaintiffs	:	
v.	:	Civil Action No: 89-2046
	:	Magistrate Judge Robinson
LUMBERMENS MUTUAL	:	(Filed November 25, 1997)
CASUALTY COMPANY,	:	
et al.,	:	
Defendants	:	

JUDGMENT ORDER

UPON CONSIDERATION of Plaintiffs' Joint Motion for Entry of Monetary Judgment against the Defendant, and based upon this Court's Memorandum Order of August 6, 1997, it is this 25th day of November, 1997.

ORDERED, that judgment is hereby entered in favor of S.J. Groves and Sons, Inc. against Defendant Lumbermens Mutual Casualty Company in the amount of $1,999,083.21; and it is further

ORDERED, that judgment is hereby entered in favor of the Plaintiff Granite Construction Company against the Defendant Lumbermens Mutual Casualty Company in the amount of $994,889.73; and it is further

ORDERED, that judgment is hereby entered in favor of the Plaintiffs E.C. Ernst and Pennsylvania Manufacturers' Association Insurance Group against the Defendant

Lumbermens Mutual Casualty Company in the amount of $362,866.21; and it is further

ORDERED, that judgment is hereby entered in favor of Plaintiffs Truland Corporation and Liberty Mutual Insurance Company against the Defendant Lumbermens Mutual Casualty Company in the amount of $354,843.43; and it is further

ORDERED, that the foregoing monetary judgments shall bear interest from August 6, 1997 to the present and continuing in accordance with the provisions of 28 U.S.C. § 1961.

S/ Deborah A. Robinson

Deborah A. Robinson,
Magistrate Judge
United States District Court
for the District of Columbia

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY MUTUAL INSURANCE COMPANY, et al., Plaintiffs, v. LUMBERMENS MUTUAL CASUALTY COMPANY, Defendant.	Civil Action No. 89-2046 DAR (Filed November 25, 1997)

ORDER

By an Order entered on August 6, 1997, the court denied defendant Lumbermens Mutual Casualty Company's ("Lumbermens' ") post-trial motions relating to plaintiffs' claims of damages and granted Plaintiffs' Motion for Judgment on Damages. On August 20, 1997, defendant moved for judgment or, in the alternative, to alter or amend judgment or, in the alternative, for a new trial (Docket No. 222). Plaintiffs thereafter moved for entry of monetary judgment (Docket No. 224); defendant moved to strike an affidavit (Docket No 229) and a letter (Docket No. 233) offered by plaintiff Granite Construction Company ("Granite") in opposition to defendant's motion for judgment or, in the alternative, to alter or amend judgment or, in the alternative, for a new trial.

Upon consideration of the motions; the memoranda in support thereof and in opposition thereto; the court's August 6, 1997 memorandum order; the parties' supplemental memoranda concerning pre-notice expenses and the entire record herein, it is, this 25th day of November, 1997

ORDERED, for all the reasons offered by plaintiffs, that defendant Lumbermens' Motion for Judgment or, in the Alternative, to Alter or Amend Judgment or, in the Alternative, for a New Trial (Docket No. 222) is **DENIED;** and it is

FURTHER ORDERED, for all the reasons offered by plaintiffs, that Plaintiffs' Joint Motion For Entry of Monetary Judgment (Docket No. 224) is **GRANTED,** and monetary judgment is entered in accordance with the Judgment Order of this date; and it is

FURTHER ORDERED, for all of the reasons offered by plaintiff Granite, that defendant Lumbermens' Motion to Strike Affidavit of William L. Elkins (Docket No. 229) and Motion to Strike November 3, 1996, CNA Insurance Companies Letter (Docket No. 233) are **DENIED.**

S/ Deborah A. Robinson

DEBORAH A. ROBINSON
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 97-7241 **September Term, 1998**
89cv02046

Liberty Mutual Insurance Company, et al.,
Appellees

v.

Lumbermen's Mutual Casualty Company,
Appellant

Washington Metropolitan Area Transit Authority and
Pennsylvania Bourse Inc.,
Appellees

(Filed March 3, 1999)

BEFORE: Silberman, Ginsburg and Sentelle,
Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed February 17, 1999, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: S/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 97-7241 **September Term, 1998**
89cv02046

Liberty Mutual Insurance Company, et al.,
Appellees

v.

Lumbermen's Mutual Casualty Company,
Appellant

Washington Metropolitan Area Transit Authority and
Pennsylvania Bourse Inc.,
Appellees

(Filed March 3, 1999)

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant's Petition for Rehearing En Banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: S/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Supreme Court, U.S.
FILED
AUG 16 1999
OFFICE OF THE CLERK

No. 99-117

IN THE

Supreme Court of the United States

LUMBERMENS MUTUAL CASUALTY COMPANY,
Petitioner,

v.

LIBERTY MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case concerns the interpretation of ambiguous language in an insurance policy drafted and issued by Petitioner, Lumbermens Mutual Casualty Company. The "Questions Presented" are:

I. Whether Lumbermens Was Afforded a Proper Jury Trial on the Question of Whether Coverage Existed under an Insurance Policy Drafted and Issued by Lumbermens Where the Jury Found the Parties Did Not Have a Mutual Intent Regarding the Meaning of the Determinative Policy Language "and Such Contract Has Been Accepted by WMATA."

II. Whether the District Court Properly Concluded that Granite Had Standing to Maintain Its Claim.

III. Whether the District Court in Attempting to Resolve Ambiguous Language in an Insurance Policy Drafted and Issued by Lumbermens Properly Barred Witness Testimony Which Did Not Bear on the Parties' Mutual Intent.

IV. Whether the District Court Properly Held that PMA and Liberty Had Not Agreed in Settlements to Limit Their Claim for Damages for Pre-Judgment Interest and Allowable Attorney Fees.

V. Whether the District Court Properly Determined that Maryland Law Applied Where the Location of the Risk, Alleged Defective Condition, and the Underlying Injury All Occurred in Maryland.

LIST OF PARTIES

The Respondents herein are:

Granite Construction Company

S.J. Groves & Sons Company

Liberty Mutual Insurance Company

Pennsylvania Manufacturers Association Insurance Group

The Appellees below included Truland Corporation ("Truland") and The Philadelphia Bourse, Inc. d/b/a E.C. Ernst ("Ernst"). Truland and Ernst were subsequently dismissed and are not parties to this proceeding.

STATEMENT PURSUANT TO RULE 29.6

None of the Respondents has a parent corporation and there are no publicly held companies which own 10% or more of the stock of any Respondent.

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Appendix A — Excerpts From Transcript Of Oral Argument Of The United States Court Of Appeals For The District Of Columbia Circuit Dated December 3, 1998 ..... R. App. 1

OPINIONS BELOW

The decisions of the Court of Appeals on the suggestion for rehearing *en banc* and petition for rehearing (App. C, 38a-39a) are unreported.[1] The opinion of the Court of Appeals (App. A, 1a-3a) is unreported. The opinions, judgments and orders of the District Court (App. B, 4a-37a) are unreported.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked by Petitioner under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL PROVISION INVOLVED

Respondents' position is that there is no constitutional issue legitimately involved in this Petition. However, Petitioner asserts that there is a Seventh Amendment issue:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

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1. Citations herein to "__a" are to the Appendices filed by the Petitioner. Citations herein to "R. App. __" are to the Appendix filed herewith by the Respondents.

STATEMENT OF THE CASE

A. Procedural History

S.J. Groves & Sons Company ("Groves"), Granite Construction Company ("Granite"), Pennsylvania Manufacturers Association Insurance Group ("PMA"), and Liberty Mutual Insurance Company ("Liberty"), (collectively the "Respondents"), and Ernst and Truland, former contractors, subcontractors, and certain insurers thereof, filed a declaratory judgment action seeking defense and indemnification by Lumbermens Mutual Casualty Company ("Lumbermens" or "Petitioner") for damages stemming from an accident that occurred at the Addison Road Metro Station in Prince Georges County, Maryland. The Respondents argued that they were entitled to defense and indemnity under a general comprehensive liability policy (the "Policy") issued by Lumbermens, which provided liability insurance coverage to the Washington Metropolitan Area Transit Authority ("WMATA") and any contractor or subcontractor of WMATA. The Policy contained an endorsement (Endorsement 7A) which extended coverage to liabilities arising three years after (1) operations have been completed, *and* (2) the contract has been accepted by WMATA. Endorsement 7A, states:

> [T]his policy does not apply, except with respect to WMATA, to bodily injury or property damage included within the Completed Operations Hazard or Products Hazard if such bodily injury or property damage occurs more than (3) years following the time when all operations to be performed by a named insured having a general or prime contract with WMATA have been

> completed *and such contract has been accepted by WMATA* but only with respect to those operations under the completed and accepted contract.[2]

The Policy defined when operations were deemed to be completed under the definition of "completed operations hazard."[3] The Policy did not, however, contain any definition of the term "accepted" or the phrase "and such contract has been accepted by WMATA." The critical question in this litigation has been the proper construction of the term "accepted" within the completed operations endorsement.[4]

The District Court found that the policy language "and such contract has been accepted by WMATA" was ambiguous. A jury trial subsequently was held to determine whether the ambiguity in the language could be resolved with the aid of extrinsic evidence and, if so, to determine when the contract was accepted. At the conclusion of the jury trial, the jury determined it was not able to resolve the ambiguity based on the mutual intent of the parties. In accordance with the jury's verdict, the District Court construed the policy language against Lumbermens, and in favor of coverage for the Respondents.

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2. Completed Operations Endorsement 7A, Brief of Appellant, Vol. II, Appellate App. at 00836 (filed Aug. 19, 1998) (emphasis added).

3. Completed Operations Endorsement 7, Vol. II, Appellate App. at 00835 (filed Aug. 19, 1998).

4. Mem. Op. & Order at App. 7a (Dec. 21, 1995) ("[t]his case turns on the proper construction of the term 'accepted' in the insurance policy").

Lumbermens appealed the District Court's holding, based on numerous allegations of error.[5] The Court of Appeals found only two of Petitioner's claims had merit. The Court of Appeals held that Petitioner was entitled to a jury trial on the amount of damages recoverable for attorney fees in the underlying cases and also held that two of the parties below — Truland and Ernst — should have been dismissed as not the real parties in interest. Lumbermens subsequently petitioned the Court of Appeals for rehearing, including rehearing *en banc* on all issues not remanded to the District Court. This petition was denied without opinion.

B. Factual Background

On May 21, 1976, WMATA contracted with a joint venture consisting of Groves and Granite ("Granite-Groves") for the construction of the Addison Road Metro Station in Prince Georges County, Maryland — Contract No. 1G0031. As a general contractor on the project, Granite-Groves, in turn, subcontracted the electrical work first to Ernst, and later to Truland.

On June 4, 1987, one person was killed and two persons were injured as a result of an electrical-related accident at the Addison Road Metro Station. In connection with that accident, the Respondents herein were named as third-party defendants[6] in three separate lawsuits filed in the United

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5. While Petitioner states in its brief that it raised nine issues on appeal, in fact, Petitioner presented the Court of Appeals with eleven claimed errors.

6. Initially, WMATA was the only defendant named in the actions.

States District Court for the District of Columbia.[7] The lawsuits were settled prior to trial.

On October 23, 1989, Respondents filed a declaratory judgment action seeking insurance coverage under the Policy. The Respondents argued that they were entitled to insurance coverage because WMATA did not accept the contract until June 8, 1984, via a letter from WMATA to Granite-Groves. That letter stated, in relevant part "this letter is to advise you formally of the Authority's acceptance of the contract." In addition, in response to interrogatories, WMATA stated on two occasions that the final acceptance of the contract was made by the June 8, 1984 letter.[8] Accordingly, pursuant to Endorsement 7A — which provides three years of completed operations coverage — the Respondents were entitled to insurance coverage until June 8, 1987. Lumbermens countered by arguing that the contract was accepted before June 8, 1984.

REASONS FOR DENYING THE WRIT

In seeking a writ of certiorari, Petitioner argues that it was denied its right to a jury trial on all issues in violation of the Seventh Amendment and in contravention of the laws of Maryland and the District of Columbia. Petitioner also alleges that the District Court erred in its determination that Maryland law applied. Petitioner further alleges error by the District Court in limiting the testimony of certain witnesses

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7. (1) *Estate of Alice Lucy v. WMATA*, C.A. No. 87-2630 (JHG) (D.D.C. complaint filed Sept. 24, 1987); (2) *Butler v. WMATA*, 87-3425 (GHR) (D.D.C. complaint filed Dec. 17, 1987); and (3) *Artis v. WMATA*, 87-2319 (HHG) (D.D.C. complaint filed date unknown).

8. In one instance, WMATA later retracted its original position.

and in its application of law. Petitioner argues that, except for the two issues which the Court of Appeals reversed, "the court of appeals failed to address any of the other issues raised by Lumbermens."[9] Lumbermens' Petition should be denied. As demonstrated below, none of Petitioner's claims warrants review by this Court because they are factually incorrect and/or the issue was properly decided below. Furthermore, Petitioner has failed to demonstrate an important federal question or a decision by the Court of Appeals that so far departs from the accepted and usual course of judicial proceedings or sanctioned such a departure by the District Court, as to call for an exercise of this Court's supervisory power. *See* S. Ct. R. 10.

I.

PETITIONER WAS AFFORDED A PROPER JURY TRIAL ON THE QUESTION OF WHETHER THERE WAS COVERAGE UNDER THE POLICY.

A. The Court of Appeals Considered Petitioner's Claims of Error

As a threshold matter, Petitioner contends that the Court of Appeals did not consider its claim that it was not afforded a proper jury trial.[10] Petitioner's claim is without any factual basis whatsoever. Indeed, as evidenced by the Court of Appeals' action in reversing the District Court on two issues, the Court of Appeals carefully considered all of Petitioner's allegations of error. However, the Court of Appeals'

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9. Petitioner Br. at 3.

10. Petitioner Br. at 7-8.

Memorandum Opinion makes clear that it found "only two" of Petitioner's claims had merit:

> Lumbermens appeals, claiming that the verdict was tainted by a variety of errors committed by the trial court.
>
> Two, but only two, of Lumbermens' arguments have merit.[11]

The principal authority relied upon by Petitioner in asserting its claim that the Court of Appeals erred is *Salve Regina College v. Russell*, 499 U.S. 225 (1991). Petitioner's reliance on *Russell* is misplaced. *Russell* concerned a case where the Court of Appeals stated explicitly that it deferred to the interpretation of state law made by the federal judge of that state, apparently without engaging in a *de novo* review.[12] The Supreme Court "conclude[d] that a court of appeals should review *de novo* a district court's determination of state law."[13] *Russell* does not have any direct relevance to this case. The Petitioner has not identified any evidence to indicate that the Court of Appeals' holdings below resulted from an impermissible deference to the District Court's interpretation of state law. Moreover, *Russell* does not hold that the Court of Appeals must conduct a *de novo* review of every allegation of error by the District Court. Certainly, different standards of review apply to different issues. For example, with respect to issues involving

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11. Memorandum Op. at App. 3a.

12. 499 U.S. at 230.

13. *Id.* at 231.

supervision of litigation — like the District Court's ruling limiting witness testimony concerning so called "newly discovered" evidence — it is especially common for such issues to be given abuse-of-discretion review. *Pierce v. Underwood*, 487 U.S. 552, 558 n.1 (1988); *see also Washington Hosp. Ctr. v. Cheeks*, 394 F.2d 964, 965-66 (D.C. Cir. 1968). In any event, there is simply no evidence that the Court of Appeals failed to engage in the appropriate standard of review of Petitioner's various allegations of errors.

Petitioner also complains that the Court of Appeals' written opinion did not discuss the court's rationale on each point of error raised by Petitioner that was rejected by the Court, focusing instead on those issues as to which the District Court's decision was reversed. The Court of Appeals was not required, however, to write a lengthy opinion on each of the "barrage of issues," in the court's own words, raised by Petitioner on appeal.[14] In this regard, to the extent *Russell* has any relevance, albeit only by analogy, it is worthwhile to note the Court's statement therein that "[i]f the court of appeals finds that the district court's analytical sophistication and research have exhausted the state-law inquiry, little more need be said in the appellate opinion."[15]

B. Petitioner's Claim That It Was Denied a Proper Jury Trial Is Factually Without Merit

Petitioner argues that the District Court failed to permit the jury to determine the meaning of the policy language, "and

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14. Transcript of Appellate Argument dated December 3, 1988 ("Appellate Argument") at R. App. 2.

15. *Russell*, 499 U.S. at 233.

such contract has been accepte[illegible] WMATA."[16] Petitioner's claim is factually misleading. The parties below engaged in an intensive jury trial to decide whether the ambiguity in the language could be resolved through extrinsic evidence. At the conclusion of the trial, the jury was presented with two questions for resolving the issue of whether coverage existed under the Lumbermens policy. First, the jury was asked to determine whether the ambiguity in the Policy language could be resolved, based upon the mutual intent of the parties. Second, if there was a discernable mutual intent, the jury was to determine when the contract was accepted. The Verdict Form reflects the two-step procedure given to the jury.[17]

On November 13, 1996, the jury found that the parties who negotiated the Policy did not have a mutual intent regarding the meaning of the Policy term "accepted."[18] Because the jury decided that it could not resolve the ambiguity regarding what "accepted" was intended to mean, it never, and properly could not, reach the second step of deciding when the contract was accepted. What Petitioner is really complaining about is the procedural manner in which the case was framed for the jury's consideration and not that it was denied its right to a jury trial. As recognized by the Court of Appeals, "[a]ll you're [Petitioner] really challenging on the jury issue though, is where the burden was placed."[19] These types of

16. Petitioner Br. at 7.

17. *See* Verdict form at 30a-31a.

18. As intimated by the Court of Appeals at oral argument, resolution of this issue governed whether or not there was insurance on the date of the occurrence. Appellate Argument at R. App. 4-5.

19. *Id.* at R. App. 4.

decisions are routinely made by trial court judges each day and do not merit this Court's review. The law is well settled that the District Court has wide discretion in the presentation of evidence at trial.[20]

II.

RESPONDENT GRANITE CONSTRUCTION COMPANY IS A PROPER PARTY TO THIS ACTION.

Lumbermens asserts that the District Court and Court of Appeals were in error by failing to dismiss this case against Granite. Lumbermens' argument is that because the insurers of Granite initially paid the damages sought and then Granite reimbursed its insurer 100%, it cannot pursue this case.

Granite did pay 100% of the damages it incurred. This was sworn to in the Affidavit of William L. Elkins. The District Court was correct in denying Lumbermens' Motion to Strike this Affidavit since Lumbermens did not support its Motion with any sufficient reason as to why said Affidavit should be stricken. Federal Rule of Evidence 1002 did not prevent the lower court from considering said Affidavit, nor did any other Rule. It also needs to be remembered that Lumbermens never raised the issue of Granite not being a proper party plaintiff for over seven years; its Motion raising this issue was not filed until October 15, 1996. The Plaintiffs' (Respondents' herein) Motion for Judgment on Damages,

20. *Johnson v. Mortham*, 915 F. Supp. 1574, 1581 (N.D. Fla. 1996) (citing *Geders v. United States*, 425 U.S. 80 (1976)); *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1371 (11th Cir. 1994); *United States v. Maddox*, 944 F.2d 1223, 1230 (6th Cir.), *cert. denied*, 502 U.S. 950 (1991); *see also Machesney v. Brundi*, 905 F. Supp. 1122, 1130 (D.D.C. 1996); Fed. R. Evid. 611(a).

which contained all supporting documentation as to how the damages sought in this case were initially paid, was filed on July 8, 1993. Lumbermens filed a Motion for Summary Judgment on November 1, 1995, and never raised the issue of Granite not being a proper party plaintiff.

In sum, the lower courts' decisions were correct and properly applied this Court's decision in *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 381 (1949).

III.

THE DISTRICT COURT PROPERLY BARRED WITNESS TESTIMONY WHICH DID NOT BEAR ON THE PARTIES' MUTUAL INTENT.

Petitioner contends that the Court of Appeals failed to consider Petitioner's claim that the District Court erred in refusing to permit witnesses to testify about their intent, interpretation, and understanding of the ambiguous policy language at issue.[21] Petitioner cites only one of the District Court's stated reasons — the witnesses' admitted failed recollection — for why the testimony in question was restricted.[22] However, the District Court restricted the testimony for several different reasons, including whether the offered testimony regarding intent was unilateral or shared, the untimeliness of the proffered testimony, and whether the testimony amounted to "opinion" from witnesses who were not designated as experts. The courtroom colloquy and the resulting opinion shows that the Court of Appeals did consider Petitioner's various claims but simply was not

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21. Petitioner Br. at 12.

22. *Id.*

persuaded by Petitioner's arguments regarding the limitations imposed. For example:

> THE COURT: [T]his sort of intent was sort of developed very late in the process, after discovery.
>
> * * *
>
> THE COURT: No. I'm referring to the material that you wanted to get before the Court. The Court wouldn't allow you to bring in.
>
> MR. LOPATA: We . . . wanted to get that from the witnesses and the Court refused to allow me to bring out any evidence concerning what they intended —
>
> THE COURT: Which was a shift. It was inconsistent with what they had said earlier. Right?
>
> MR. LOPATA: I believe so, Your Honor.
>
> THE COURT: Yeah. You think the District Judge abused her discretion for refusing to allow you to do that?
>
> MR. LOPATA: Yes. We asked for an amendment of the pre-trial statement. We gave the parties notice. We gave them at least three week's notice. We indicated that they would be available to have the depositions of the witnesses who were recalling facts and discussions that occurred more than two decades before. And they were able to

> recall at least a month before trial, as to what the intent was for having the accepted contract in the language. And we moved to amend our pre-trial statement so we could assert that defense. And she abused her discretion by not allowing us to have our witnesses to testify.
>
> With regard —
>
> THE COURT: If you're wrong about that, what's left of your case?[23]

The above exchange exemplifies the Court of Appeals' knowledge and understanding of the record and the attention given to Petitioner's claims of error regarding the restrictions imposed by the District Court on witness testimony, and there are additional examples. One of Lumbermens' key witnesses at trial on the issue of intent was Samuel Asquith. Mr. Asquith negotiated and drafted the insurance policy at issue on behalf of Lumbermens. At trial, Mr. Asquith testified, "I am at a loss at this point in time to explain how we put such a phrase [and such contract has been accepted by WMATA] together," and was not permitted to testify as to his unilateral uncommunicated intent or interpretation of the ambiguous policy language.[24] At oral argument, the Court of Appeals offered that it found Mr. Asquith's testimony "*devastating*" to Petitioner's case.[25] In sum, as a factual matter, the record demonstrates that there is no merit to

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23. Appellate Argument at R. App. 2-4.

24. Trial Transcript, dated Nov. 17, 1996, Vol. I Appellate App. at 00401.

25. Appellate Argument at R. App. 6 (emphasis added).

Petitioner's desperate contention that the Court of Appeals failed to consider its claims of error regarding witness testimony.

Petitioner also argues that the District Court's rulings limiting certain testimony strayed so far from the mandate of the law that they represented substantial departures from the accepted and usual course of judicial proceedings.[26] Contrary to Petitioner, the District Court's evidentiary rulings were well in accordance with established contract law. A party can only be bound by a particular meaning of a provision of a contract if the party is aware of that meaning.[27] Moreover, "[e]vidence of intent may be considered in testing the reasonableness of alternative interpretations of a writing only when there is reason to believe the intent was shared." *Haeberle v. Texas Int'l Airlines*, 738 F.2d 1434, 1440 (5th Cir. 1984). In *Eagle Star & British Dominions Ins. Co. v. Fleischman*, 175 Md. 433, 2 A.2d

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26. Petitioner Br. at 12.

27. *Smith v. Hughes Aircraft Co.*, 783 F. Supp. 1222, 1226 D. Ariz. 1991) (citing *Restatement (Second) of Contracts* § 211 (1981)), *aff'd in part and rev'd in part on other grounds*, 10 F.3d 1448 (9th Cir. 1993) ("when dealing with standardized, boilerplate contracts, the Court would enforce the reasonable expectations of the insured and bind them only to those known terms"); *Carey Canada, Inc. v. California Union Ins. Co.*, 720 F. Supp. 1018, 1026 (D.D.C. 1989) ("In reviewing the extrinsic evidence to determine the intent of the parties, we have placed great importance on the objective manifestation of the parties' intent and understanding, as shown by their acts, conduct, and communications, not on their subjective, *unexpressed* intent.") (emphasis supplied), *aff'd in part and rev'd in part*, 940 F.2d 1548 (D.C. Cir. 1991); *Owens-Illinois Inc. v. Aetna Cas. & Sur. Co.*, 597 F. Supp. 1515, 1522 (D.D.C. 1984) ("Implicit in this statement is a finding that extrinsic evidence of the parties subjective intent or construction is irrelevant to the policies' interpretation.").

424 (1938) the Maryland Court of Appeals explicitly held that the insurer's contention that it did not intend to insure certain properties under a fire insurance policy could not bind the insured when there was no evidence that the insurer's intent was made known to the insured. Petitioner has not cited to a single case that supports *the proposition that the unilateral uncommunicated intent of one party is a relevant inquiry for the jury*. Rather, the cases Petitioner cites[28] all stand for the general proposition that if a contract is ambiguous, extrinsic evidence may be used to determine *the intention of the parties*.

Petitioner argues that the District Court erred in refusing to allow the jury to hear certain testimony of the witnesses who were responsible for drafting the Policy language.[29] These persons principally involved Messrs. Asquith (representing Petitioner) and Erickson (representing WMATA). The record is clear that these negotiators did not have a mutual intent regarding the Policy language at issue. Indeed, they both testified that they did not communicate their particular intent with each other or with WMATA. As previously indicated, Mr. Asquith testified that he could shed no light on the parties' mutual intent of the language. Similarly, Mr. Erickson testified that he also had no recollection of the intent of the subject language:

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28. These cases cited by Petitioner include: *1010 Potomac Assoc. v. Grocery Mfrs. of Am. Inc.*, 485 A.2d 199, 205 (D.C. App. 1984); *Canaras v. Lift Truck Servs. Inc.*, 272 Md. 337, 352, 322 A.2d 866 (1974); *Admiral Builders Sav. & Loan Ass'n v. South River Landing, Inc.*, 66 Md. App. 124, 132, 502 A.2d 1096 (1986); *Chicago Bd. Options Exch., Inc. v. Connecticut Gen. Life Ins. Co.*, 713 F.2d 254, 258 (7th Cir. 1983); and *International Bhd. of Painters & Allied Trades v. Hartford Accident & Indem. Co.*, 388 A.2d 36, 43 (D.C. App. 1978).

29. Petitioner Br. at 12.

Q: Is it fair to say you do not recall the intent of that language [and such contract has been accepted]?

A: I do — I do not recall any anything about the intent of that.[30]

Thus, as Lumbermens must concede, these critical witnesses could have offered only their unilateral, uncommunicated intentions regarding completed operations coverage under the Policy. Such testimony is not permissible under Maryland law, and the District Court correctly precluded that testimony. Therefore, there is no merit to Petitioner's claim that this Court need grant its Petition on the ground that the District Court's rulings represented substantial departures from the accepted and usual course of judicial proceedings.

IV.

THE DISTRICT COURT'S DECISION NOT TO LIMIT THE DAMAGES RECOVERABLE BY PMA AND LIBERTY FOR PRE-JUDGMENT INTEREST AND ALLOWABLE ATTORNEYS FEES WAS APPROPRIATE.

Lumbermens asserts that the lower courts' decisions failed to properly interpret a settlement agreement. Specifically, Lumbermens argues that the lower courts were in error in awarding Ernst/PMA and Truland/Liberty interest and fees because of a settlement agreement in one of the underlying cases in which those plaintiffs agreed to limit

30. Trial Transcript, dated Nov. 17, 1996, Vol. I Appellate App. at 00393.

their recovery to a capped amount.[31] There is no merit to Lumbermens' argument.

First, Lumbermens discusses the settlement in the *Lucy* case, implying that the settlement agreement in that case was the only agreement that was the subject of the declaratory judgment action. In fact, however, there were three underlying cases and three separate settlement agreements in each of those underlying cases which were the subject of the declaratory judgment action and for which the plaintiffs sought reimbursement. The settlement agreement in the *Artis* case was completely silent with respect to any claims made against the policy issued by Lumbermens. The settlement agreements in the *Butler* and *Lucy* cases specifically stated that the release of claims in those cases would not apply to claims for insurance coverage made against the policy issued by Lumbermens. The *Butler* case had no agreement to cap any such recovery. Thus, Lumbermens' claim that Ernst/PMA and Truland/Liberty should not be able to recover in excess of the cap agreed to in the settlement, even if valid, would be of no consequence since the current insurance coverage litigation also concerns the *Artis* and *Butler* cases.

With respect to the settlement in the *Lucy* case, that agreement provided that Truland/Liberty agreed to limit any recovery "*against the policy*" to a sum no higher than $225,000 and Ernst/PMA agreed to limit any recovery "*against the policy*" to a sum no higher than $250,000. Exhibit C to Plaintiff's Motion for Judgment on Damages (Docket No. 196). The only claims Ernst/PMA and Truland/Liberty have made against the Lumbermens policy are the claims for reimbursement of the settlement amounts in the underlying cases, and the attorneys fees incurred to

31. Petitioner Br. at 14.

defend those underlying actions. Those amounts total less than the caps agreed to in the *Lucy* settlement agreement. The claims made by Ernst/PMA and Truland/Liberty for prejudgment interest and attorneys' fees incurred in the current declaratory judgment action are not claims against the Lumbermens' policy for coverage of the underlying matter, but rather, are additional costs for which the law provides reimbursement due to Lumbermens' refusal to defend and indemnify its insureds. That amount is above and beyond any amounts reimbursed pursuant to an insurance policy.

The *Osternack*[32] case relied upon by Lumbermens offers no support to its claim of error. In *Osternack*, the Court held that a motion for discretionary prejudgment interest filed after the entry of judgment constitutes a motion under Rule 59(e). The Court noted that prejudgment interest was part of the compensation due the plaintiff and therefore was not collateral to the judgment with respect to the filing of an appeal. In contrast, the Court noted that attorneys' fees under 42 U.S.C. § 1988 (1994 & Supp. III 1997) were separable from the underlying merits of the controversy.

Similarly, Maryland decisions have held that prejudgment interest should ordinarily be allowed as a matter of course when the plaintiff's damages are liquidated. *See, e.g., I.W. Berman Properties v. Porter Brothers, Inc.*, 276 Md. 1, 344 A.2d 65, 77 (1975). In *Brethren Mutual Insurance Co. v. Filsinger*, the Maryland Court of Special Appeals ruled that regardless of an insurance company's good faith denial of coverage, an insured is entitled to recover interest from the date the coverage was denied. 54 Md. App. 357, 458 A.2d 880, 885, *cert. denied*, 296 Md. 223, 462 A.2d

32. *Osternack v. Ernst & Whinney*, 489 U.S. 169 (1989).

66 (1983). *See also Foltz v. U.S. News & World Report, Inc.*, 613 F. Supp. 634, 648 (D.D.C. 1985). As indicated, an award of prejudgment interest and attorneys fees is separate from the claim made against the policy.Thus, there is no merit to Lumbermens' argument.

V.

THE DISTRICT COURT CORRECTLY DETERMINED MARYLAND LAW APPLIED.

Lumbermens contends that the District Court erred in applying Maryland law, instead of District of Columbia law, to this action. Lumbermens also contends that the District Court's ruling was not addressed by the Court of Appeals.[33] Lumbermens' criticism of the Court of Appeals is again factually incorrect. The transcript of the appellate argument demonstrates conclusively that the Court of Appeals considered Petitioner's claim that the District Court's decision regarding choice of law was error. In fact, at oral argument the Court of Appeals expressed some initial puzzlement, later dispelled, that Maryland law should apply rather than D.C. law.[34] The Court of Appeals engaged Mr. Fennell, counsel for Respondent Groves, in a direct inquiry on the choice of law issue. *Id.* at R. App. 6-12. Furthermore, Mr. Lopata, counsel for Petitioner, on rebuttal also specifically addressed the choice of law issue. *Id.* at R. App. 13. There is simply no merit to Petitioner's claim that the choice of law issue was not addressed on appeal.

In addition, there is no dispute now, nor was there below, that the choice of law rules of the District of Columbia

33. Petitioner Br. at 16.

34. Appellate Argument at R. App. 6.

apply.[35] The issue that Petitioner seeks to have reviewed by this Court is the District Court's application of that law. Contrary to Petitioner, the District Court did not "ignore" the applicable law of the District of Columbia in determining the applicable law.[36] "With regard to contract issues, the courts of the District of Columbia follow the governmental interest analysis adopted in the Restatement (Second) of Conflict of Laws (1971)." *National Union Fire Ins. Co. v. Binker*, 665 F. Supp. 35, 39-40 (D.D.C. 1987); *see also Gray v. Grain Dealers Mut. Ins. Co.*, 871 F.2d 1128, 1130 (D.C. Cir. 1989).

The District Court's analysis shows that it applied the proper test in making its choice of law determination. In its first ruling that Maryland law applies here, the District Court noted Maryland's significant interest, stating:

> It is undisputed that the electrical shock which caused the death of Alice Lucy occurred in Maryland. Maryland has a substantial interest in applying the law to determine liability for an injury which results from an allegedly defective condition existing on Maryland property. Maryland also has a significant interest in regulating the safety of construction projects within its borders and assuring that persons who work within the state comply with Maryland standards of conduct.

See Mem. Op. & Order at 9-10 (Sept. 22, 1989). In a subsequent opinion, the District Court also pressed the importance of the

35. Mem. Op & Order at 4 (Sept. 22, 1989) ("All parties agree that the choice of law rules of the District of Columbia must be followed.").

36. Petitioner Br. at 17.

location of the risk being in Maryland.[37] In that regard, the District Court relied, in part, on Section 193 of *Restatement (Second) of Conflict of Laws* (1971). Section 193 provides that the importance of the risk's principal location "enjoys the greatest significance when an *immovable is involved*, such as when the risk insured against is damage by fire to a particular building." *Id.* at 612 cmt. b (emphasis added). Of course, as the District Court found, the accident stemmed from an immovable — "an immobile handhole, embedded in a concrete sidewalk . . . in . . . Maryland." Mem. Op. & Order at 12 (Sept. 22, 1989). Thus, the District Court properly considered District of Columbia law in concluding that Maryland's interests in the litigation were paramount. Therefore, Petitioner's claim of error is without merit.

VI.

THIS CASE DOES NOT PRESENT IMPORTANT QUESTIONS FOR REVIEW.

Petitioner alleges that the most egregious error was committed by the Court of Appeals in refusing to address several of Petitioner's arguments raised on appeal.[38] As demonstrated above, however, this claim is unsubstantiated and wildly off the mark. Likewise, Petitioner's assertion that "this case involves issues that are of importance to litigants in general" is without merit.[39] Petitioner's claimed errors by

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37. Mem. Op. & Order at 5 n.3 (Dec. 21, 1995).

38. Petitioner Br. at 18.

39. *Id.* at 17-18.

the District Court all pertain to the resolution of particular ambiguities in an insurance contract that are unlikely to ever repeat themselves. Certainly, none of these decisions can be fairly argued in any respect to be a far departure from the accepted and usual course of judicial proceedings. Furthermore, what Petitioner labels as a "jury trial" issue is factually incorrect and is more accurately described as a litigation management issue. How the jury was instructed to attempt to resolve the ambiguous policy language was a procedural issue properly within the discretion of the trial judge.

CONCLUSION

Petitioner has failed to make a compelling case that this Court should exercise its discretionary review and the Petition should be denied.

Respectfully submitted,

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APPENDIX A — EXCERPTS FROM TRANSCRIPT OF ORAL ARGUMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED DECEMBER 3, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-7241

LIBERTY MUTUAL INSURANCE COMPANY, et al.

Appellant,

v.

LUMBERMENS MUTUAL CASUALTY COMPANY,

Appellees.

Thursday, December 3, 1998
Washington, D.C.

The above-entitled matter came on for oral argument, pursuant to notice,

BEFORE: Circuit Judges Silberman, Ginsburg and Sentelle

* * *

[4] * * *

THE COURT: Counsel, you put in a barrage of issues in this case.

MR. LOPATA: Yes, Your Honor. Because there are numerous errors.

THE COURT: And my suggestion for oral argument is could you focus on what you think your strongest arguments are.

MR. LOPATA: My strongest argument, Your Honor, is the fact that the negotiating parties that Mr. Art Erickson and Mr. Sam Asquith, who were the only negotiating parties to the contract, all agreed and intended that the completed operations coverage would be limited to three years after the work had been accepted by WMATA. In the April '90 —

THE COURT: And you're giving a factual point. What is your legal argument?

* * *

[8] MR. LOPATA: No, were talking about the intent of the parties when they were negotiating —

THE COURT: I know, but wasn't it sort of late, this sort of intent was sort of developed very late in the process, after discovery.

MR. LOPATA: Your Honor, you're referring to the letters that were sent out by WMATA. WMA —

THE COURT: No. I'm referring to the material that you wanted to get before the Court. The Court wouldn't allow you to bring in.

MR. LOPATA: We wanted to get that from, oh, we wanted to get that from the witnesses and the Court refused to allow me to bring out any evidence concerning what they intended —

THE COURT: Which was a shift. It was inconsistent with what they had said earlier. Right?

MR. LOPATA: I believe so, Your Honor.

THE COURT: Yeah. You think the District Judge abused her discretion for refusing to allow you to do that?

MR. LOPATA: Yes. We asked for an amendment of the pre-trial statement. We gave the parties notice. We gave them at least three week's notice. We indicated that they would be available to have the depositions of the witnesses who were recalling facts and discussions that occurred more than two decades before. And they were able to recall at least a month before trial, as to what the intent was for having the [9] accepted contract in the language. And we moved to amend our pre-trial statement so we could assert that defense. And she abused her discretion by not allowing us to have our witnesses to testify.

With regard —

THE COURT: If you're wrong about that, what's left of your case?

* * *

[12] * * *

THE COURT: All you're really challenging on the jury issue though, is where the burden was placed. The interpretation of that clause does in fact govern whether there was insurance on the date of the occurrence or not. Doesn't it?

MR. LOPATA: No, Your Honor. Because —

THE COURT: It doesn't?

MR. LOPATA: No, because the answer to that, Your Honor, if in fact, there was no mutual understanding as to the [13] language that was used in the policy still raises a question that that language is ambiguous, and if the language is ambiguous and is subject to various interpretations, then it's a question of fact for the jury to decide, not as Judge Robinson did.

THE COURT: The question of fact for them to decide, though, is the intent of the parties as to that, at most, would be the intent of the parties, as to that clause. The question of whether or not insurance coverage then followed would be a matter of law. Wouldn't it?

MR. LOPATA: No, Your Honor. Because you would have to consider if, in fact, as was held, that the clause was

ambiguous. That doesn't automatically mean that you find coverage because as Judge Green —

THE COURT: That's why I last phrased the question, the interpretation of that clause, that is to say what extent when it's accepted, governs whether or not there was coverage on the date of the occurrence. Does it not?

MR. LOPATA: Absolutely, Your Honor. Yes, I misunderstood you. But that's a question for the jury to decide as to when the contract was accepted on the various dates it outlined.

THE COURT: The question for the jury to decide is first, if at all, would be what was meant by accepted in the contract. At most, that would be for the jury to decide. [14] Right?

MR. LOPATA: That's for the jury to decide and —

THE COURT: Once they decided that, if it was theirs to decide, once somebody decided that, then whether there was coverage or not at the occurrence follows as a matter of course. Doesn't it?

MR. LOPATA: It's another question for the jury to decide. Even if the language is still declared to be ambiguous, it still follows that the jury then has to decide when, considering all the evidence and all the intent of the parties, when the contract was accepted by WMATA. And it was a jury question rather than as a matter of law that was found. And they precluded us a jury trial.

* * *

[19] * * *

MR. FENNELL: They indicate that. That's appellees position generally. But when you talked about the specific language, we have the testimony of Mr. Asquith in the record where I pointed out. He drafted it and he says that language remained intact throughout any discussion. So that when you look at it, you have to go back and realize that he's the drafter of the language. When you go look at the record, in response to Lumbermens own counsel's question at trial, he said and I quote, he says "I am at a loss at this point in [20] time to explain how we put such a phrase together." He's referring to the phrase and such contract as been accepted by WMATA.

THE COURT: I thought that was a rather devastating statement.

* * *

THE COURT: I have one small question, counsel. Although appellant's doesn't raise it. And I think it's relevant only to the attorneys fees and may not even be relevant on that given a recent move on the part of the D.C. Court of Appeals to vacate and *en banc* the issue of whether attorneys fees can be awarded in this matter.

But why, I'm a little puzzled at the argument that Maryland law should apply here rather then D.C. law. It seemed to me that what the District Judge did is conflate two questions which is the tort law dealing with the risk of the accident, with the question of which law should govern the interpretation in the insurance contract. What's a little

puzzling about that is this insurance contract is given to [21] cover construction in Maryland, D.C. and Virginia. Under your theory, you could have different interpretations of that contract in all three jurisdictions. And that didn't make —

MR. FENNELL: Your Honor, may I address, first, the point you made about the D.C. Circuit, D.C. Court of Appeals and the vacating.

THE COURT: Yeah.

MR. FENNELL: We've checked that. On October 8th, that appeal was dismissed. I believe it was settled, so that matter isn't going forward. As to D.C. law on this issue, it remains unsettled. Moving to your point on choice of law. If you look at the *Banker* decision, it basically says that in this kind of a circumstance, Section 193 the restatement second of conflicts of law should apply. Cause you're talking about a casualty insurance policy.

THE COURT: Yes. So who has the — which jurisdiction carries the greatest —

MR. FENNELL: And it talks about principle location under risk. When you're talking about a wrap around insurance policy —

THE COURT: The risk is not the risk of an injury, it's a risk of insurance. Isn't it?

MR. FENNELL: No, Your Honor. What you're talking about is the risk that you're insuring against is some sort of an injury.

[22] THE COURT: No, but I wan — what I'm talking about is it's, when we're talking about the risk here, it's not the risk of an injury taking place on the site, which would be governed by tort law. But rather the risk deals with the risk of nonpayment of insurance.

MR. FENNELL: No, Your Honor, under Section 193, it would be the former. When you're looking at —

THE COURT: So under these cir — well we've had —

THE COURT: We've insured against. Which would be the injury.

THE COURT: Yes. That's it. The risk insured against.

MR. FENNELL: And here you have —

THE COURT: But that's a question of liability, not so much a question of injury. Right? Yes.

MR. FENNELL: It would be under the way that the restatement works. It would be both. You're looking at what was the risk insured against.

THE COURT: What do you do with —

THE COURT: She you applied Maryland. Right?

THE COURT: Yeah.

MR. FENNELL: She applied Maryland law, Your Honor. And we believe that was correct under Section 193.

THE COURT: What standard of review do we apply in deciding whether she was correct or incorrect?

MR. FENNELL: What standard?

[23] THE COURT: What standard of review do we apply?

MR. FENNELL: Your Honor —

THE COURT: Nobody deals with that in the briefs, I don't think.

MR. FENNELL: Your Honor, I believe that maybe *de novo* review on a choice of law decision. But as to the —

THE COURT: Would there be an underlying fact question as to where the risk insured against was greatest, so as to require a substantial evidence review on the fact question and a *de novo* review after that?

MR. FENNELL: I believe so, Your Honor. And I think that on the question of the risk, if I could address that, cause I was going to answer that as part of the other question too.

This particular policy deals with risk created by the Addison Road Metro Station construction. For example, it's in the record, Mr. Erickson's testimony. If the contractor had a problem back at his yard, construction yard that's away from the premises. This insurance deals with risk at that premises. And it's in Maryland and what you're dealing with here is a handhold, on all electrical handhold which is an

immovable object. You can look at Section 193 of the restatement —

THE COURT: So the term accepted could have three different meanings in Virginia, D.C., and Maryland?

[24] MR. FENNELL: Your Honor, theoretically, you can have a difference under Section 193. Practically, I don't think given the way Judge Green looked at the law, the fact that no one under any jurisdiction really has a uniform way of looking at the term accepted in a contract circumstance that you would run into that. But if you look at comment c I believe of Section 193 —

THE COURT: Well, wouldn't collateral estoppel limit this problem?

MR. FENNELL: Your Honor, I don't think it would. I'm trying to be forthright about it because I deal —

THE COURT: That's helpful. That's helpful.

MR. FENNELL: I deal with insurance —

THE COURT: — being forthright.

MR. FENNELL: I deal with insurance generally.

THE COURT: It's exhilarating when lawyers are forthright.

MR. FENNELL: Well, but on Section 193, if you look at comment c, in comment c, it talks about the fact that if

you had a policy that would cover buildings and you had fires in Maryland, D.C. and Virginia, Section 1993 says you would treat it as three separate policies. And so the laws of those three states would apply. So, the drafters of the restatement considered this issue and recognized it.

THE COURT: Not exactly.

[25] THE COURT: That's a fiction for avoiding the embarrassment that Judge Silberman is pointing to and it's transparently a fiction that the embarrassment is not really avoided. That yet the same contract would have three different meanings in three different jurisdictions.

MR. FENNELL: Your Honor, that's a possibility. And in fact, Your Honor, in the world insurance law, that happens. And I can give you an example in environmental matters. You can have a contract, insurance contract that applies to environmental states, sites around the country. And if the Court —

THE COURT: I mean it's one thing in California and something else in the other 49 states.

MR. FENNELL: So this is not unique. This is something that courts are struggling with.

THE COURT: But if the risk here, if the risk was the risk of liability, now of course Judge Sentelle makes an excellent point which is there's nothing in the record or evidence on this. Appellant hasn't put in evidence to the effect that most of the lines of tracker in the District of

Columbia as opposed to Virginia and Maryland. Therefore, the greatest risk is in the District of Columbia, and that's where the contract was negotiated and signed, and therefore it should be D.C. law that would cover the whole business. But if you did take the extent of the risk, and the risk was [26] co-extension with the amount of property, it would be D.C., if the D.C. was the majority of the property. Right?

MR. FENNELL: If you follow your assumption, Your Honor, it's just a matter of adding up where the majority —

THE COURT: Right. But we don't have that in the record.

MR. FENNELL: No, Your Honor. And so I'm clear in my position, our position is that, and Judge Green addressed this earlier, and I think it's in the Appendix where this argument was made. And she said, you know, if this happened on a train that was moving from Maryland to D.C., you might have had a better argument on the appellant's side. This is an immovable handhold that's at that station in Maryland and Maryland's interest would be greater with respect to any injury at that station.

THE COURT: See that's an interest in the jury and the tort law. That's not the interest in interpreting the insurance contract.

MR. FENNELL: Understood, Your Honor. But even so, if you look at Section 193, and the restatement, and you look at Section 6, you end up with a very broad weighing of interests. And you can take those interests into account.

* * *

[35] * * *

MR. LOPATA: Beg your pardon, Your Honor, I thought it did. One other point, Your Honor, if I may. Going to your other question about the principal risk under the insurance policy and about the lack of evidence in the record, we made a proffer to Judge Robinson that Mr. Roberti would testify to exactly the fact that the principal risk under the insurance policy was in the District of Columbia because the complex construction that occurred in D.C. as opposed to in the outlying areas because they had a tunnel. And she refused to allow us to bring out that testimony from Mr. Roberti. So there —

* * * *

Supreme Court, U.S.
FILED
SEP 27 1999
OFFICE OF THE CLERK

(3)

NO. 99-117

IN THE
SUPREME COURT OF THE UNITED STATES

LUMBERMENS MUTUAL CASUALTY COMPANY,

Petitioner,

v.

LIBERTY MUTUAL INSURANCE COMPANY, et al.

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY BRIEF

Pursuant to Rule 15.6, Petitioner files its Reply Brief to address new points raised in Respondents' Brief in Opposition.

I. The Court of Appeals' Decision Reveals No Consideration of the District Court's Legal Analysis.

In its Petition for a Writ of Certiorari, Petitioner averred that the court of appeals, in contravention of this Court's directive in Salve Regina College v. Russell, 499 U.S. 225 (1991), failed to provide a careful consideration of the district court's legal analysis. In response, Respondents simply state that there is no evidence that the court of appeals impermissibly deferred to the district court's determination of state law. The problem with the court of appeals's decision, and Respondents' attempt to justify that decision, is that it gives no indication of any kind of review, much less the "careful consideration" mandated by this Court. The numerous state law issues raised by Petitioner in the appellate court were simply not addressed by the court of appeals. Respondents' own citation to Russell belies their own argument. They cite Russell for the proposition that

"[i]f the court of appeals finds that the district court's analytical sophistication and research have exhausted the state-law inquiry, little more need be said in the appellate opinion." 499 U.S. at 233. Notwithstanding this admonition, the opinion of the Court of Appeals lacks even that minimal finding.

II. The Lower Courts Violated Petitioner's Rights Under the Seventh Amendment and Dispositive Substantive Law by Failing to Permit the Jury to Determine the Meaning of the Contract at Issue.

Respondents contend, in their Brief, that, because the jury found that the parties who negotiated the Policy did not have a mutual intent as to the meaning of the term "accepted", the jury therefore could not resolve the ambiguity over the meaning of that word. Consequently, Respondents argue that the jury could not decide when the contract was accepted and, presumably, they contend that the district court was correct in making the factual determination of the meaning of the Policy language. Respondents' Brief at 9. However, Respondents are wrong in two respects.

First, if the Respondents are correct in asserting that the jury found that the parties did not have a mutual intent as to the

meaning of the Policy term "accepted", then the enforceability of the Policy is in question since, if there is no meeting of the minds as to the Policy language, there is no enforceable contract. Pavel Enterprises, Inc. v. A.S. Johnson Company, Inc., 342 Md. 143, 647 A.2d 521 (1996); Jack Baker, Inc. v. Office Space Development Corporation, 664 A. 2d 1236, 1238 (D.C. App. 1995 ("for an enforceable contract to exist, there must be … agreement as to all material terms; …"). Thus, there could be no liability imposed on Petitioner under the Policy.

Second, as set forth in the Petition for a Writ of Certiorari, it is beyond question that, while it is the court's function to determine if an ambiguity exists, it is for the jury, as finder of fact, to interpret the meaning of the ambiguous language. Nationwide Mutual Insurance Company v. Tufts, 118 Md.App. 180, 702 A.2d 422 (1997), cert. denied, 349 Md. 104, 707 A.2d 89 (1998); 1901 Wyoming Ave. Corp. v. Lee, 345 A.2d 456, 461, n. 8 (D.C. App. 1975). Contrary to Respondents' attempt to characterize Petitioner's argument, the principal error was that of the district court in usurping Petitioner's right to have

the jury interpret the meaning of the disputed policy language. By refusing to permit such a determination by the jury, the lower courts violated Petitioner's right to a jury trial under the Seventh Amendment.

III. The Lower Courts' Decisions Failed to Apply Well-Settled Tenets of Contract Interpretation by not Limiting PMA's and Liberty's Recoveries to the Amounts Agreed Upon in their Settlement Agreement.

As explained in the Petition, Ernst/PMA and Truland/Liberty entered into a settlement agreement in the underlying Lucy case that limited their respective recoveries against the Lumbermens policy. The amounts paid by Ernst/PMA and Truland/Liberty to settle and defend the underlying case total a lesser amount than the caps contained in the settlement agreement. Nevertheless, the trial court awarded Ernst/PMA and Truland/Liberty damages for prejudgment interest and attorneys' fees for prosecuting this action, which amounts far exceeded the caps in the settlement agreement. In response, Respondents assert that there were other settlement agreements that did not include such caps. Respondents' Brief at

17. They further assert that the only claims made by Ernst/PMA and Truland/Liberty against the Lumbermens policy are the claims for settlement amounts paid and fees incurred in the underlying cases, and contend that the additional claims for prejudgment interest and attorneys' fees in the instant action are not claims against the Lumbermens policy. Id. at 17-18. This assertion is legally and factually incorrect.

If the prejudgment interest and attorneys' fees do not arise out of a claim against the Lumbermens policy, it is difficult to imagine what they are based upon. These damages are unquestionably recoveries against the Lumbermens policy; but for the policy, Respondents could have made no claim. Further, if the cap in the settlement agreement was not intended to apply to these types of damages, then the language of the cap is meaningless. When they settled the Lucy case, Ernst/PMA and Truland/Liberty knew or should have known of the amount of their payments for settlement and attorneys' fees in that case, which totaled less than the amount of the cap.

If the award of interest and fees is impacted by the other settlement agreements, that do not include a cap, that is an issue that can be addressed by the district court on retrial. Nevertheless, the plain language of the Lucy settlement agreement compels the conclusion that the award of prejudgment interest and attorneys' fees for prosecuting this action is limited by the cap contained therein.

CONCLUSION

For the reasons contained in the Petition and herein, the lower courts' errors which violated Petitioner's right to jury trial and contravened applicable state law should be corrected, and a writ of certiorari should be granted.

Respectfully submitted,

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